Supreme Court, U.S.
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In the

Supreme Court of the United States

GERALD MOLNAR,

Petitioner,

v.

CARE HOUSE (Child Abuse and Neglect Council of Oakland County, Michigan), AMY ALLEN, JANICE POKELY, CITY OF TROY, RENEE MOLNAR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is a difference between probable cause for prosecution and probable cause for arrest.

2. Whether a positive finding on the former with no finding on the latter at a state court preliminary hearing precludes a litigant from bringing a subsequent § 1983 claim for false arrest in a federal court.

3. Whether a private actor can be construed as a state actor for the purposes of § 1983 litigation when a State *requires* its law enforcement agencies to refer children of whom sexual abuse has been alleged, to such private actor for conducting a forensic interview in the aid of an ongoing criminal investigation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gerald Molnar respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Molnar brought the underlying action against the Defendants Care House, Amy Allen, Janice Pokley, City of Troy and Renee Molnar pursuant to the provisions of 42 U.S.C. § 1983, 1988, the Fourth Amendment and Fourteenth Amendments of the Constitution and the pendent state law claims. Molnar filed his Amended Complaint in the United States District Court for the Eastern District Court of Michigan on January 30, 2007. The District Court entered an Opinion and Order Granting the Defendants' Motions to Dismiss and for Summary Judgment on September 4, 2008. App. B, 12a. The U.S. Court of Appeals for the Sixth Circuit affirmed the District Court's grant of summary judgment on December 29, 2009. App. A, 1a. Molnar's Petition for Rehearing *En Banc* was denied by the Court of Appeals on March 17, 2010. App. D, 68a.

JURISDICTION

This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 and Rule 13.3, because it is being filed within 90 days of the entry of the order denying rehearing *en banc*. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Fourth and the Fourteenth Amendment, Section 1 of the Constitution of the United States and the Civil Rights Act of 1871, 42 U.S.C.A. § 1983, 1985, and Michigan's Child Protection Law, MCLA §722.628. The relevant statutory provisions are reproduced at Appendix. App. E.

STATEMENT OF THE CASE

I. Background Facts

In 1998, Gerald Molnar ("Molnar") filed for divorce against his wife Renee Molnar ("Renee"). *Immediately thereafter*, Renee began a tirade of false allegations against Molnar alleging that he had physically and sexually abused his children. ER 3 at 3[1]. Between 1998 and 2003, Renee made ten false allegations of abuse against Molnar and others. Renee falsely accused Molnar of physically and sexually abusing their children, of being an alcoholic, perpetrator of domestic violence, a drug abuser, and as someone who masturbated in front of his children. ER 3 at 3 – 9. *Each* of Renee's allegations was investigated by Michigan's Family Independence Agency and/or Child Protective Services' investigators and was found to be **unsubstantiated**.[2]

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[1] ER refers to the District Court's docket, COA Doc.# refers to the filings in the U.S. Court of Appeals for the Sixth Circuit.

[2] Molnar, in his Amended Complaint, listed the FIA referral numbers for every allegation made by Renee that was investigated by the FIA and was found to be unsubstantiated. ER 3.

During this time, Molnar learned that his children were being poisoned and alienated against him. On or around August 22, 1998, Molnar's minor daughter EM told Molnar that her maternal grandmother, Marie Koch, was trying to manipulate and coerce her to claim that Molnar had engaged in sexually inappropriate behavior with EM. Molnar's attorney sought immediate court intervention, seeking to limit the access of maternal grandmother to the Molnar children. A copy of a psychologist's report (who had evaluated EM) was attached to Molnar's motion. Fearing that the Court would acquiesce to Molnar's well founded request, Renee's attorney offered to "admonish" the grandmother. ER 3 at 6.

In November 2000, Molnar filed a federal §1983 action against Renee and other, claiming damages arising from false claims of sexual abuse: Molnar v. Lopez / Case No. 00-75050 (E.D. Mich.). The District Court dismissed the lawsuit because the Court believed that Molnar did not suffer damage to his statutory or constitutional rights, i.e. his parental rights were not terminated; he was not deprived of custody of his children; nor was he prosecuted based upon any of the false allegations. The U.S. Court of Appeals for the Sixth Circuit affirmed the District Court's decision. ER 3 at 11-12.

During the 3-year pendency of the first federal lawsuit, *Renee made no complaint or referral or allegation against Molnar*. As soon as the federal complaint was dismissed, Renee renewed her campaign of false allegations of abuse against Molnar. ER 3 at 12.

In October of 2003, Renee took EM, then 7 years old, to City of Troy's police department and met with Detective Janice Pokely. EM is alleged have told Renee that Molnar "touched her vulva." As mandated by Michigan's law and the county protocol promulgated pursuant to the law, Detective Pokely referred EM to Care House for a forensic interview.

On October 16, 2003, the "Care House Manager" and its "primary forensic interviewer" Amy Allen interviewed EM at Care House. ER 3 at 22. Despite being aware of the history of unsubstantiated false allegations of abuse in the Molnar case, Allen conducted her interview with a strong confirmatory bias: her goal was to confirm the accusations that originated with Renee and pin a crime on Molnar. ER 3 at 23. Allen asked repetitive and suggestive questions to 7-year old EM until she elicited the "right" answer from the child. ER 3 at 23. This however was not surprising for a forensic interviewer who attended a training seminar on how "not to help the defense." ER 3 at 23.

After watching Allen interview EM through a two-way mirror, Pokley went to Molnar's residence to interview him. ER 18-2 at 3. Molnar's friend Mary Ellen Urban was present during this meeting.[3] ER 18-2 at 5.

Molnar informed Pokley that Renee had made numerous false allegations accusing him of abusing their children. ER 18-2 at ¶ 7. Molnar also told Pokley

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[3] Molnar later married Ms. Urban. Ms. Urban passed away in December 2009

that each and every accusation made by Renee had been investigated by the FIA or the CPS and was found to be unsubstantiated. Id. ¶8, ER 18-3 pg. 252-253, 257, 263-264. Molnar also gave information to Pokley that documented Renee's numerous false accusations against Molnar. ER 18-2 at ¶10, ER 18-3 pg. 252-253.

Molnar also informed Pokley that Renee's brother, Brian Koch, was a convicted pedophile and that Molnar had several times objected to Brian Koch having access to his children. ER 18-2 at ¶11. Molnar also gave sex offender internet registration information concerning Brian Koch to Pokley. *Id.* ¶12, ER 18-3 pg. 256. Molnar also informed Pokley that his objections to Brian Koch having access to his children had led Renee to threaten him, in front of witnesses: "*You better watch out or you just might find yourself in the same boat one day.*" ER 18-2 at ¶13; ER 3 at ¶71. Molnar told Pokley who these witnesses were.

Molnar further informed Pokley that soon after the threat, pursuant to his divorce attorney's advice, Molnar had moved in Mary Ellyn Urban. ER 18-2 at ¶14-15. Ms. Urban also informed Pokley that she was *always* present during the time that Molnar spent with his children and did not see any inappropriate behavior. ER 18-2 at ¶16-17.

Pokley refused to look at this evidence. ER 18-2 at ¶17. Pokley also refused and/or failed to follow-up on the exculpatory information that was given to her by different individuals. ER 3 at 13-16, ER 18-2 pg. 2-7, ER 18-3 pg. 252-255, 264. Pokley did not investigate any alternative hypothesis; she never even considered them. ER 18-3 pg. 253-255. During Molnar's criminal

trial, Pokley accurately summarized her investigation: "*I did not do anything.*" ER 18-3 pg. 264.

On or around November 24, 2003, Pokley completed her report and requested a warrant against Molnar for the offense of Criminal Sexual Conduct in the second degree. ER 18-2 pg. 7. Based upon the warrant, on or around December 5th, 2003, Molnar submitted to an arrest, was finger-printed and booked at Troy police station. ER 18-2 at ¶18-21.

The State of Michigan brought criminal charges against Molnar based upon Pokley's "investigation" and Care House / Amy Allen's "forensic interview." ER 3 at 24. In October of 2005, after a four day jury trial, the jury unanimously found Molnar "Not Guilty" of the charged offense.

Molnar thereafter brought the underlying §1983 action against Renee, Pokely and the City of Troy ("City Defendants"), and Amy Allen and Care House ("Care House Defendants") for violating his federal Constitutional rights. Molnar alleged that he was falsely arrested in violation of the Fourth Amendment, and that he was denied procedural and substantive due process and equal protection. Molnar also alleged that the Defendants engaged in a conspiracy to violate his Constitutional rights in contravention of 42 U.S.C. § 1985. Finally, Molnar asserted a *Monell* failure-to-train claim against the City and supplemental state law claims against all the Defendants.

II. Decision of the District Court

The City Defendants and the Care House Defendants filed motions for summary judgment. The

District Court granted both motions. The Court *inter alia* ruled that (a) the Care House Defendants were not state actors and hence were not liable under the § 1983 claims, and that (b) collateral estoppel precluded Molnar from asserting a claim for false arrest against the City Defendants because the state court made a finding of probable cause for a bind over at the preliminary hearing in Molnar's criminal case. The Court further dismissed Molnar's other claims on the ground that Molnar had failed to present evidence in support of his claims. Molnar appealed.

III. Decision of the Sixth Circuit Court of Appeals

In his appeal, Molnar argued that it was improper for the District Court to grant summary judgment when Molnar had no opportunity to conduct discovery (Molnar alleged that *pursuant to the District Court's direction*, parties had held discovery in abeyance pending the resolution of the motions for summary judgment). Molar also argued that there was a radical difference between probable cause for a bind over of a case for a jury trial and probable cause for an arrest and that the latter was never litigated nor decided in the state court proceeding. Molnar also argued that given the fact that Michigan's law *requires* a police officer to seek Care House's assistance in investigating an alleged crime of sexual abuse and that the forensic interviews of the children conducted by Care House's personnel constitute an integral part of this investigation, Care House Defendants did function as state actors.

The Sixth Circuit Court of Appeals affirmed the District Court's ruling in an unpublished opinion. In

its decision, the Court declined to address the issue whether Care House is a state actor. The Court thereafter denied Molnar's request to review the panel's decision *en banc*.

REASONS FOR GRANTING THE PETITION

Molnar respectfully submits that there are three reasons why this Court should grant his petition for writ of certiorari and review the Sixth Circuit Court of Appeal's decision. First, the ruling by the Sixth Circuit Court of Appeals on the issue collateral estoppel and its preclusion of federal § 1983 claims conflicts with this Court's precedent and well established law. Second, this case presents an opportunity for this Court to provide much needed guidance on the radical difference between probable cause for a bind over and probable cause for an arrest. Specifically, this Court should clarify that a positive finding on the former with no finding on the latter does not preclude a litigant from bringing a subsequent § 1983 action. Third, this petition raises a significant question of federal law with respect to the role played by a private agency in assisting Michigan's law enforcement agencies in investigating alleged crimes of child sexual abuse. The question being: when Michigan's law *requires* its police officers to outsource an integral part of their criminal investigation to a private agency, should such private agency be considered a state actor?

I. THE SIXTH CIRCUIT COURT OF APPEAL'S DECISION CONFLICTS WITH SUPREME COURT PRECEDENT

A. The Sixth Circuit Court of Appeal's Decision Conflicts With the Supreme Court Precedent and Well Established Law

Law is well established on when collateral estoppel can be invoked against a § 1983 claimant to bar relitigation of his Fourth Amendment claims decided against him in a state criminal proceeding. Collateral estoppel can be invoked against a § 1983 claimant to bar relitigation of his Fourth Amendment claims that were litigated and decided against him in a state court proceeding. *Allen v. McCurry*, 449 U.S. 90, S.Ct. 411 (1980).

It is equally well established that collateral estoppel does *not* preclude a § 1983 claimant to litigate issues that were not actually litigated in the state court proceedings, were not decided by the state court and/or whose determination was not necessary to the adjudication of the state-court proceeding. *Donovan v. Thames*, 105 F.3d 291, 295 (6th Cir. 1997); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982); *Haring v. Prosise*, 462 U.S. 306, 316 (1983).

Federal Circuits have been consistent in adhering to this well-established law. *See B.C.R. Transport Co., Inc. v. Fontaine*, 727 F.2d 7, 11, 12 (1st Cir. 1984); *Cameron v. Forgarty*, 806 F.2d 380, 384-85 (2d Cir. 1986); *Linnen v. Armainis*, 991 F.2d 1102, 1105-06 (3d Cir. 1993); *Prosise v. Haring*, 667 F.2d 1133, 1140-41 (4th Cir. 1981); *Watts v. Graves*, 720 F.2d 1416, 1421-22 (5th Cir. 1983); *Darrah v. City of Oak Park*, 255

F.3d 301, 311 (6th Cir. 2001); *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir. 1989); *Davis v. City of Charleston, Mo.*, 827 F.2d 317, 321 (8th Cir. 1987); *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004); *Dixon v. Richer*, 922 F.2d 1456, 1459 (10th Cir. 1991); *Webb v. Ethridge*, 849 F.2d 546, 549-50 (11th Cir. 1988).

The Sixth Circuit decision in this case ignored this well established body of law. Molnar alleged that Detective Pokely deliberately suppressed and excluded exculpatory information that was *known* to her from her report. Consequently, the magistrate who issued a warrant for Molnar's arrest was deliberately kept in the dark about this information. *See* ER 3, ¶68-86, ER-10-3, pg. 7-12. A "police officer ... may be liable if he fails to apprise the prosecutor or a judicial officer of known exculpatory information." *Brady v. Dill*, 187 F.3d 104, 114 (1st Cir.1999). In short, Molnar challenged the integrity of Pokely's investigation and the consequent legality of his arrest.

The underlying decisions of the District Court and the Sixth Circuit Court of Appeals ignored Molnar's claim and instead focused on Molnar's state court preliminary exam. The District Court held and the Sixth Circuit affirmed that because the state court did not rely on Pokely's testimony at the preliminary hearing and made an "independent" finding of probable cause, Molnar was barred from "relitigating" his claims challenging Pokely's investigation and legality of his arrest. The Courts glossed over the facts that: (1) there were *two* findings of probable cause: first by the magistrate who, relying upon Pokely's statements, issued a warrant for Molnar's arrest and second, by the state court who, relying upon EM's

testimony at the preliminary hearing, bound the case over for trial, (2) Molnar had no opportunity to challenge or litigate the finding of probable cause in the former proceeding - at the time when the magistrate issued a warrant for his arrest, (3) Molnar did not litigate the issues of the integrity of Pokely's investigation and legality of his arrest in the latter proceeding - at his preliminary hearing, and (4) These issues were not *necessary* for the state court to decide when all it was required to do was to determine whether Molnar should be bound over for trial on a charge of sexually abusing his minor daughter.

In granting summary judgment to the Defendants, the Sixth Circuit ignored the well established law on the issue of preclusion effect by doctrine of collateral estoppel, including its own decision in *Darrah v. City of Oak Park*, 255 F.3d 301 (6th Cir.2001). In *Darrah*, the Court allowed a federal §1983 claimant's claims challenging the **integrity** of police investigation and/or **legality of an arrest** in an underlying criminal case.[4] Similar to the facts in *Darrah*, Molnar claimed that Pokely fabricated probable cause for his ***arrest*** and turned a blind eye towards exculpatory evidence that was *known* to her. ER 3 at ¶ 85-91, 149, 162-170. Collateral estoppel precludes relitigation of an issue only if a court has already decided the issue and the determination of the issue was ***necessary*** to its judgment. *Kremer v. Chemical Constr. Corp.*, 456

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[4] Also, in *Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 197 (6th Cir. 1987), the Court held that a "plaintiff's §1983 action is not the same cause of action as the state's criminal case against her and collateral estoppel...did not preclude the plaintiff's action because neither the validity .... nor the legality of the arrest was litigated or decided in the prior state court proceeding."

U.S. 461, 467 n.6 (1982); *Donovan v. Thames*, 105 F.3d 291, 295 (6th Cir. 1997). Determination of integrity of Pokely's investigation and/or legality of Molnar's arrest was not necessary to the state court's determination of whether Molnar should be bound over for trial. Issues related to Molnar's arrest were never litigated (and could not have been litigated) at Molnar's preliminary hearing and therefore could not bar Molnar's subsequent §1983 action.[5]

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[5] A proper application of the doctrine of collateral estoppel can be found in the Sixth Court's ruling in *Donovan v. Thames*, 105 F.3d 291 (6th Cir. 1997). Donovan was charged in a state court criminal action with domestic violence, possession of drugs and resisting arrest. Donovan moved to suppress the evidence recovered from his house. After a suppression hearing, the state court denied Donovan's motion and **found**, in a written opinion and order, that the police officers had **probable cause to arrest** Donovan. *Id.* at 293. At trial, Donovan was convicted of resisting arrest and the drug-related charges but was acquitted of the charge of domestic violence. Donovan filed a §1983 action against the police officers. The officers moved for summary judgment on the ground that collateral estoppel barred Donovan's claims. The federal district court ruled that at Donovan's suppression hearing, the state court determined that Donovan's arrest was valid and that the officers had probable cause to arrest him. The court held that his finding was essential to the trial court's denial of Donovan's motion to suppress and that Donovan had a full and fair opportunity to litigate this issue. Therefore, the court held that Donovan was precluded from relitigating the issue of the validity of his arrest in his §1983 action. The Sixth Circuit affirmed the district court's grant of summary judgment with respect to Donovan's claim for arrest without probable cause. *Id.* 298-299. However, with respect to Donovan's claim of excessive force, the Court ***reversed*** the district court's grant of summary judgment because this issue was not precluded by Donovan's conviction for resisting arrest. *Id.* at 298. This Court held that the issue of excessive force was neither "necessary" nor "essential" to the state court criminal proceeding and was not (and could not be) litigated by Donovan in that case.

Relying on *Buttino v. City of Hamtramck*, 87 Fed.Appx. 499, 504 (6th Cir. 2004), the Sixth Circuit held that since the state court did not rely on Pokely's testimony to establish probable cause, collateral estoppel precluded Molnar from relitigating his claims of false arrest. However, in *Buttino*, the Court acknowledged that Buttino had alleged that the police officer had misrepresented evidence related to the probable cause determination at two different stages of the proceedings: his arrest and his preliminary hearing. *Id.* at 504. The *Buttino* Court agreed that collateral estoppel did *not* preclude Buttino from asserting his claim based on his arrest as "the issues [were] not identical."[6] *Id.*

Here, Molnar has challenged the probable cause determination **at his arrest**. Whether the state court relied or not on Pokely's testimony at the preliminary hearing (that was conducted to *solely* to decide whether to bind Molnar over for trial) is irrelevant. What's relevant is that the magistrate who issued the warrant for Molnar's arrest did rely on Pokely's statements. Even by *Buttino's* rationale, the two

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Id at 295 (*emphasis added*). *Also see Vinson v. Campbell County Fiscal Court*, 820 F.2d 194, 197 (6th Cir. 1987).

[6] Buttino's claim as to his arrest failed because he failed to submit any evidence supporting his claims. In order to shoehorn the facts into Buttino's template, the Sixth Circuit likewise ruled that Molnar was unable to come forth with evidence. App. A, 11a. However, unlike Buttino, Molnar was not afforded an opportunity to conduct discovery. *See* Molnar's complaints that he was "railroaded" by not being allowed to conduct discovery and then told that he had failed to present evidence to support his claims. COA Doc.# 00615572423, pg 24 – 31; COA Doc.# 00615624044, pg. 2 – 11

proceedings in the underlying state proceeding were separate, one concerned probable cause for Molnar's arrest, the other related to probable cause for binding Molnar over for trial and "the issues [were] not identical." *Id.*

B. The Sixth Circuit Conflated Probable Cause For A Bind Over With Probable Cause For An Arrest

The Sixth Circuit further compounded its error by overlooking the significant difference between probable cause for an arrest and probable cause for prosecution and conflating the two. The Sixth Circuit conflated the two radically different kinds of probable causes.

As the Court held:

> "Even accepting Molnar's allegation that Detective Pokely 'knowingly supplied the magistrate with false information'...the state court did not rely on her testimony *to establish probable cause*. Rather, it bound him over for trial based on Elizabeth's 'very believable' testimony....Since the state court did not rely on Detective Pokely's statements to establish probable cause, Molnar is left to argue that probable cause did not exist to bind him over for trial. This same issue was previously litigated in the preliminary hearing, and thus collateral estoppels bars Molnar from re-litigating in here." App. A., 10a (*emphasis in original*)

The Sixth Circuit missed the mark. The fact that the state court did not rely on Pokely's statements to establish probable cause to bind Molnar over for trial

is separate and distinct from the fact that a magistrate, at a different time and at a different proceeding, did rely on Pokely's statements to establish probable cause to issue a warrant for Molnar's arrest. On or around December 4, 2003, Pokely "swore out the warrant to Magistrate Donald Chisholm at 52-4 District Court in Troy, who then issued the warrant." *See* Pokely's Brief, COA Doc.# 00615610197, pg. 14; Molnar's Reply, COA Doc.# 00615624044, pg. 12. Magistrate Chisholm *did* rely on Pokely's statements to *establish* probable cause for Molnar's arrest at a proceeding that was distinct and separate from the state court preliminary hearing. The Sixth Circuit deliberately ignored this distinction even though it was briefed and argued to the panel. *See* Molnar's Reply, COA Doc.# 00615624044, pg. 12.

Further, the Sixth Circuit ruled that *Molnar* was left with the argument that "probable cause did not exist to bind him over for trial [and] [that] [t]his same issue was previously litigated in the preliminary hearing, and thus collateral estoppels bars Molnar from re-litigating in here." App. A., 10a. The Sixth Circuit created a straw man, proceeded to destroy it and in doing so again conflated the two distinct and separate kinds of probable causes.

First, Molnar argued no such thing. Molnar never argued that the state court did not have probable cause to bind him over for trial. Molnar challenged that his *arrest* prior to the preliminary hearing was in violation of his Fourth Amendment rights - that his "seizure" was unlawful. ER 3, ¶174-185. The fact that the state court later found probable cause to bind Molnar over for trial does not *ipso facto* ratify his arrest and seizure prior to his preliminary hearing.

Second, probable cause that was established at the preliminary hearing in Molnar's criminal case was probable cause for prosecution – i.e. sufficient[7] evidence existed at that point in time to bind the case over for a jury trial. This probable cause for ***prosecution*** is radically different from probable cause for an ***arrest***. The Sixth Circuit has not opined on this issue but other federal circuits and legal scholars have. *See Sanders v. Sears, Roebuck & Co.*, 984 F.2d 972, 974 (8th Cir. 1993); *Golino v. New Haven*, 950 F.2d 864 (2d Cir 1991), *cert. denied*, 505 U.S. 1221 (1992); Schwartz, *Section 1983 Litigation: Claims and Defenses*, §11.04[C], pg. 11-19 (Fourth Edition, Aspen Publication). The issue whether Pokely had probable cause to ***arrest*** Molnar was never litigated in the state court. The issue whether Molnar's arrest was legal was never litigated nor decided in the state court. The issue of integrity of Pokely's investigation was never litigated nor decided in the state court. These issues were not necessary for the state court to determine whether to bind Molnar over for trial. These issues were radically different from the issue squarely facing the state court at Molnar's preliminary hearing: whether or not to bind Molnar over for trial.

C. The Sixth Circuit's Decision Could Lead To Unintended And Unjustifiable Consequences

The Sixth Circuit's ruling could lend itself to an interpretation that every defendant in a criminal case

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[7] The probable cause determination made at a state court's preliminary hearing is designed to evaluate the **sufficiency**, but not the **integrity**, of the evidence. *Hinchman v. Moore*, 312 F.3d 198, 203 (6th Cir. 2002); *Bailey v. Andrews*, 811 F.2d 366, 369 (7th Cir. 1987).

who was bound over for trial is precluded from later challenging his underlying arrest. In Michigan, where less than 0.03% of felony cases get dismissed at the preliminary exam stage for lack of evidence and the rest simply get bound over for trial[8], this would preclude a vast swath of civil rights plaintiffs from bringing claims under the federal civil rights laws.

The Sixth Circuit's overbroad rule of preclusion would also threaten important interests in preserving federal courts as an available forum for the vindication of constitutional rights. The rule would require "an otherwise unwilling party to try [Fourth Amendment] questions to the hilt and prevail in the state court in order to preserve the mere possibility of later bringing a § 1983 claim in federal court." *Haring v. Prosise*, 462 U.S. 306, 322-323 (1983). To expect a defendant in a criminal prosecution to challenge and *litigate* the integrity of the police investigation and/or the legality of his arrest in the *underlying criminal prosecution* – or else be barred from bringing a federal 1983 action – is absurd. "Such a rule would be wholly contrary to one of the central concerns which motivated the enactment of § 1983, namely, the 'grave congressional concern that the state courts had been deficient in protecting federal rights.'" *Id.* at 323.

The Court's ruling could also result in a bizarre outcome. In *Hirmuz v. City of Madison Heights*, 469 F. Supp. 2d 466 (E.D. Mich. 2007), the Court, in the context of fabricated confession, observed:

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[8] *See* Sauter, Jeffrey *The Case for Preliminary Examination Reform*, Michigan Bar Journal 32 (March 2006).

> "...the state court did not hold that the statement was voluntary. She merely held that there was a credibility issue to be determined by a jury. Indeed, the criminal trial judge's ruling itself suggests that it did not have preclusive effect since she held that the issue could be relitigated before the jury. The jury's acquittal suggests that it did not accept the validity or accuracy of the confession. Although the jury's determination does not preclude the defendants from relitigating the confession issue in this lawsuit, it would be ironic to conclude that the state litigation precludes the fabricated evidence claim in this case that is consistent with the state court results. The plaintiff's claims are not barred by the doctrine of collateral estoppel." *Hirmuz, supra* at 479.

As in *Hirmuz*, here the state court at Molnar's preliminary hearing did ***not*** hold that Detective Pokely had **probable cause to arrest** Molnar. Nor did the court rule on integrity of Pokely's "investigation" of the sex abuse allegations made against Molnar. *See e.g. Tierney v. Davidson*, 133 F.3d 189, 196 (2d Cir. 1998) ("the state court did not say whether it was *objectively reasonable* for the Officers to believe that what they did was legal.") (*emphasis in original*).

Here, the state court merely held that there was a credibility issue to be determined by a jury:

> "... All right, **it's a question of fact**. I'm binding it over to Circuit Court. I think the young lady was very believable." ER 18-3, pg. 139 (*emphasis added*).

The "judge's ruling itself suggests that it did not have preclusive effect since [he] held that the issue could be relitigated before the jury." *Hirmuz*, *supra* at 479. The jury's acquittal of Molnar "suggests that it did not accept the validity or accuracy" of the state court's ruling. *Id*. Now, if the jury's determination does not preclude the Government[9] from relitigating the probable cause issue by means of offensive collateral estoppel[10], "it would be ironic to conclude that the state litigation precludes [Molnar's claims] that [are] **consistent** with the state court results." *Id* (*emphasis added*).

D. Congressional Intent and Public Policy Mandates that Collateral Estoppel *Not* Preclude Molnar's 1983 Action

The main goal of the 42 U.S.C. § 1983 was to override the corrupting influence of the Ku Klux Klan and its sympathizers in government and law enforcement agencies of the Southern States. *Allen v. McCurry*, 449 U.S. 90, 101, 101 S.Ct. 411 (1980). The legislative debates show that one strong motive behind the act's enactment was grave congressional concern that the state courts had been deficient in protecting federal rights. *Id*. Congress had intended a federal remedy in three circumstances: where state substantive law was facially unconstitutional, where state procedural law was inadequate to allow full litigation of a constitutional claim, and where state

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[9] Due to privity, "[t]he Care House Defendants and the City Defendants are the same party for purposes of collateral estoppel." Sixth Circuit Opinion, App. A, 8a.

[10] *See Dowling v. United States*, 493 U.S. 342, 349-350 (1990)

procedural law, though adequate in theory, was inadequate in practice. *Id.*[11]

This Court has held:

> "Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen, supra* at 101.

The Court in *Allen* emphasized that relitigation will be available if the section 1983 plaintiff is not afforded a "full and fair opportunity" to try his claim in the state court. *Id.* The "full and fair opportunity" exception authorizes federal courts to scrutinize the adequacy of state court procedures.[12] For example, as explained above, relitigation may be available in light of "differences in the quality or extensiveness of the procedures followed in the two courts." *See* Restatement (Second) of Judgments § 28 (1982). This ensures that state court procedures fully protect federal constitutional rights. *Allen*, at 101.

As Justice Rehnquist explained in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606 (1975), preclusion rules must permit relitigation in § 1983 actions under a number of circumstances if § 1983 is to play a significant role in the supervision of state court action. Differences in the allocation of the burden of proof

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[11] *Also see*, Collateral Estoppel in Section 1983 Actions, 95 *Harv. L. Rev.* 280, 281.

[12] *Id.* at 283.

between the first proceeding and the second may rule out the application of collateral estoppel. *See* Restatement (Second) of Judgments, §28(4).[13] A good example of this in the criminal-to-civil "cross-over" collateral estoppel context was explained by this Court in *Dowling v. United States*, 493 U.S. 342, 349-350 (1990):

> "...we have held that an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof..... the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel." *Id.* at 361-362.

Arguendo, even if the exact issues present in Molnar's 1983 action were litigated in the previous underlying criminal prosecution of Molnar (they were not), the burden and allocation of proof was clearly different. In the criminal case, the *Government* had the burden of proof to prove Molnar's guilt beyond a reasonable doubt. In the present 1983 action, *Molnar* has the burden of proof and that burden is much lower than the one required in a criminal case. As this Court reasoned in *Dowling*, if the Government is not estopped from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof, Molnar similarly cannot be estopped in relitigating an issue in a subsequent civil 1983 action. *See One Lot Emerald Cut Stones v. United*

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[13] *Also see Corpus Juris Secundum*, 50 C.J.S. Judgments § 781

States, 409 U.S. 232, 235 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938).

II. CARE HOUSE DEFENDANTS ARE STATE ACTORS

Child Abuse and Neglect Council of Oakland County ("Care House") is a non-profit organization that exercises powers in Michigan that are traditionally exclusively reserved to the State. Michigan's Oakland County's protocol, which is followed by approximately 46 police jurisdictions, states that children of an age 13 and under, of whom sexual abuse has been alleged, are *required* to be interviewed at Care House. ER 3, ¶ 94. Care House takes referrals *only* from Michigan's law enforcement agencies. As the Sixth Circuit acknowledged:

> "Care House is a private organization that receives a portion of its funding from Oakland County, although it takes referrals only from law enforcement officials and Child Protective Services." App. A, 3a.

The District Court ruled that the "Care House Defendants are not state actors." App. B, 23a. The Sixth Circuit found it "unnecessary...to decide whether the Care House Defendants are state actors" and declined to rule on this issue. App. A, 8a.

In his filings with the courts, Molnar argued and presented evidence that:

(a) Care House is partially funded by Michigan's Oakland County and other state agencies. ER 39-6, pg. 241;

(b) State employees -- including DHS / FIA workers, state prosecutors, police officers and state judges[14] – serve on Care House's committees. ER 39-6, pg. 242;

(c) Care House's personnel play an integral role in investigation of claims of child sexual abuse. ER 39-3, pg. 242-244; ER 39-4, pg. 218-219;

(d) Police officers are required to "refer" children under age 13, of whom sexual abuse has been alleged to Care House for forensic interviews. ER 39-4, pg. 141-143;

(e) Care House's personnel conduct these interviews in the presence of law enforcement officers, state prosecutors, and/or CPS workers. ER 39-4, pg. 149;

(f) Care House's staff is actually trained on how not to help the defense attorneys in a criminal proceeding. ER 39-16, pg. 103; ER 39-4, pg. 172;

(g) Care House's Amy Allen has received an award from a police department for her assistance in conducting forensic interviews. ER 39-11;

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[14] State judges' participating in Care House's activities has led to criticism from Michigan's defense bar. *See* Care House Stirs Support, Concerns, The Oakland Press, February 3, 2008 at A-1; COA Doc.# 00615572423, pg 34

(h) Care House's role in obtaining a "guilty verdict" has been described as "critical" by Michigan's Oakland County Prosecutors' Office.

See COA Doc.# 00615572423, pg 31 – 44; COA Doc.# 00615624044, pg. 23-27.

None of the above facts (supported by evidence on the record) put forward by Molnar that showed the Care House Defendants to be state actors – under all the three tests[15] – were refuted, countered or distinguished by the Defendants.

It cannot be gainsaid (and none of the Defendants have disputed this) that a forensic interview is an integral part of the law enforcement's investigation of a claim of child sexual abuse. The *only* reason the Care House Defendants conducted EM's forensic interview was because Michigan's protocol and policy ***required*** Detective Pokely to refer EM to Care House for a forensic interview.

Michigan's Child Protection Law mandates:

> "(6) In each county, the prosecuting attorney and the department shall develop and establish procedures for involving law enforcement officials as provided in this section. **In each county, the prosecuting attorney and the department shall adopt and implement**

[15] The Public Function Test, the State Compulsion Test, and the Symbiotic Relationship or Nexus Test. *See* COA Doc # 00615572423, pg 31

> **standard child abuse and neglect investigation and interview protocols** using as a model the protocols developed by the governor's task force on children's justice as published in FIA Publication 794 (revised 8-98) and FIA Publication 779 (8-98), or an updated version of those publications."

MCLA 722.628(6) (*emphasis added*)

MCLA 722.628(3) further mandates:

> "...law enforcement officials **shall conduct investigations in compliance with the protocols adopted and implemented as required by subsection (6)**." (*emphasis added*)

Pursuant to MCLA 722.628(6), Michigan's Oakland County has developed and established "Child Sexual Abuse Investigative Protocol." ER 39-8. This Protocol[16] mandates that:

> "When an investigation reveals that the child is suspected of having been the victim of sexual abuse or serious physical abuse, a Care House interview of the victim **shall** be scheduled.
>
> 1. Children 12 and younger that are alleged sexual abuse victims are **required** to be

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[16] The Protocol is signed by the Director of Care House, Director of Oakland County DHS, Oakland County Prosecutor's Office, Oakland County Chief of Police and Oakland County Sheriff's Office. ER 39-8, pg. 3.

> scheduled for a forensic interview at Care House." ER 39-8, pg. 12 (*emphasis added*)
>
> The Protocol further mandates:
>
> "... Care House provides ... overall coordination of the multidisciplinary team in the **investigation of child sexual abuse** and physical abuse cases in Oakland County." ER 39-8, pg. 13 (*emphasis added*)
>
> and
>
> "Alleged offenders, their representatives or attorneys are not permitted to attend team meetings or interviews of children at Care House." ER 39-8, pg. 13

To act 'under color' of law does not require that a private party be an officer of the State. It is enough that the private party is "a willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) *quoting United States v. Price*, 383 U.S. 787, 794 (1966). It is Care House's "function within the state system, not the precise terms of [their] employment that determines whether [their] actions can fairly be attributed to the state." *West v. Atkins*, 487 U.S. 42, 55-56 (1988). Care House's "function within [Michigan's] state system"[17] is so "entwined with governmental policies"[18] that,

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[17] *West v. Atkins*, 487 U.S. 42, 55-56, 108 S.Ct. 2250 (1988).

[18] *Brentwood v. Tennessee Secondary Sch.*, 531 U.S. 288, 288-289 (2001).

regardless of which of the three tests this Court applies, the conclusion appears to be the same: Care House Defendants are state actors. It is simply unconscionable that these Defendants are permitted to freely act and exercise their power under the color of state law yet are not construed as state actors vis-à-vis federal § 1983 claims.

The Sixth Circuit panel's decision to deliberately avoid making a decision on Care House's role and status is puzzling given the plethora of evidence that was presented to the panel on this issue. *See* COA Doc.# 00615572423, pg. 31-34; COA Doc.# 00615624044, pg. 23-27. The District Court's finding that Care House Defendants are not state actors, if allowed to stand, will constitute an aberration from the well-established law as to when a private party can be considered to be a state actor for the purposes of federal § 1983 litigation.

Finally, the District Court granted summary judgment to the Defendants on Molnar's *Monell* liability claim, conspiracy claim and state law claims, on the ground that Molnar had failed to present evidence in support of his claims. ER 52 at 4, 5, 11, 17-18, 21, 22, 24, 28, 29, 33, 45, 48 & 49. Molnar pointed out to the District Court that granting summary judgment at that time was improper as "**discovery [was] yet to commence**." ER 18 at 19 (*emphasis in original*). Molnar argued to the Sixth Circuit Court of Appeals that he was "railroaded by a premature motion for summary judgment" – especially when the *District Court* had directed the parties to hold discovery in abeyance during the pendency of the dispositive motions. ER 42 at 2-3; COA Doc.# 615432817, pg. 51-54. Molnar further begged the Court

to expand the record. COA Doc.# 00615572423, pg. 24 - 31. Molnar sought to supplement the record with fourteen documents that demonstrated that the Defendants had refused to engage in discovery in keeping with the instructions from the District Court. App. A, 5a. The Sixth Circuit decided to exalt form over substance and ruled that because Molnar had not moved to supplement the record in the district court, it would decline to exercise its equitable power to allow Molnar to supplement the record. *Id.*

Respectfully, the District Court and the Sixth Circuit's rulings in this case have reduced the "remedial nature" and the "expansive sweep" of 42 U.S.C. § 1983 litigation to a farce. *Owen v. City of Independence*, 445 U.S. 622, 635-36 (1980). Molnar begs this Court to grant this petition for a writ of certiorari to review the Sixth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-2189

[Filed December 29, 2009]

GERALD MOLNAR,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CARE HOUSE, Child Abuse and Neglect Council of Oakland County, AMY ALLEN, JANICE POKELY, the CITY OF TROY, and RENEE MOLNAR,	)
	)
Defendants-Appellees.	)
	)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

Before: SILER, GILMAN, and ROGERS, Circuit Judges.

SILER, Circuit Judge. Gerald Molnar instituted this 42 U.S.C. §§ 1983 and 1985 action against Amy Allen and her employer Care House ("Care House Defendants"), and Detective Janice Pokely[1] and the City of Troy ("City Defendants") (collectively, "the Defendants"); he also asserted supplemental state-law claims against the Defendants as well as his ex-wife Renee Molnar.[2] He filed the instant suit after he was acquitted in state court of sexually assaulting his daughter Elizabeth Molnar, alleging that the Defendants' involvement in his state-court prosecution violated his federal rights. The district court granted summary judgment for the Defendants. For the following reasons, we **AFFIRM**.

I. Background

A. Facts Giving Rise to the Underlying Criminal Case Against Molnar

Renee and Gerald Molnar have been divorced since 1998. Molnar claims that Renee began accusing him of sexually abusing their youngest child Elizabeth in 1999, after he expressed concern that Renee's brother Brian Koch, a convicted sex offender, would have access to their children. Molnar also claims that Renee proceeded to make numerous false allegations to the

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[1] In his complaint, Molnar misspelled Pokley's name as "Pokely," a mistake now reflected on the docket. We, like the district court, use the docket spelling.

[2] Molnar asserted state-law defamation and false-light claims against Renee, both of which were dismissed without prejudice on September 4, 2008. His briefs on appeal do not address these claims, and, thus, we deem that he has abandoned them.

authorities that he had sexually and physically abused their children, and that the authorities found each of these accusations to be unsubstantiated.

On October 8, 2003, Renee informed Detective Pokely that her husband had sexually abused nine-year-old Elizabeth by putting his hand down her pants and touching her vulva. Detective Pokely then set up an interview at Care House,[3] and on October 16, 2003, Amy Allen, a Care House worker, interviewed Elizabeth. Elizabeth's statements were consistent and confirmed her mother's allegations.

Later that day, Detective Pokely met with Molnar and his girlfriend Mary Ellen Urban to discuss Elizabeth's allegations. Molnar denied that he had molested his daughter. He told Pokely that Renee's prior allegations had been found to be unsubstantiated. He also claimed that Urban had been present any time he was with his children. He then informed Pokely that when he had expressed concern to Renee about her brother Koch, Renee threatened to retaliate by filing false claims of sexual abuse. Urban later confirmed Molnar's story in an affidavit.

Pokely reviewed all the information gathered, including several incident reports of lewd behavior

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[3] Care House is a private organization that receives a portion of its funding from Oakland County, although it takes referrals only from law enforcement officials and Child Protective Services ("CPS"). Because we resolve this case on collateral estoppel grounds, a more complete understanding of the relationship between the City Defendants and the Care House Defendants is not relevant for purposes of this appeal.

that named Molnar as a suspect, and submitted her narrative report to the Oakland County Prosecutor's office ("Prosecutor"). Her report included a discussion of the past unsubstantiated accusations made against Molnar. She noted that Molnar lived with Urban, but did not discuss Molnar's claim that Koch was a convicted sex offender or that Urban had stated that Molnar at no time acted inappropriately. Subsequently, the Prosecutor decided to pursue a criminal complaint against Molnar, charging him with criminal sexual conduct in the second degree. At Molnar's subsequent preliminary hearing on December 23, 2003, the court found probable cause to prosecute Molnar based on Elizabeth's "very believable" testimony. Earlier, on October 24, 2003, Referee Michael Hand had temporarily suspended Molnar's visitation rights with his children based on a finding that there was probable cause of sexual abuse. After a jury trial in 2005, Molnar was acquitted.

B. Federal Suit

After his acquittal, Molnar filed an amended complaint in the United States District Court for the Eastern District of Michigan. He alleged, *inter alia*, that he was falsely arrested and maliciously prosecuted without probable cause in violation of the Fourth Amendment, and that he was denied procedural and substantive due process and equal protection. He also contended that the Defendants engaged in a conspiracy to violate his constitutional rights in contravention of 42 U.S.C. § 1985. Finally, he asserted a *Monell* failure-to-train claim against the City, a supplemental state-law claim of intentional infliction of emotional distress against all the

Defendants, and supplemental state-law claims of defamation per se and false light against Renee.

The City Defendants and the Care House Defendants filed motions for summary judgment. The district court granted both motions. Molnar appealed and has moved this court to take judicial notice of documents not contained in the district court record.

II. Analysis

A. Motion to Take Judicial Notice

Before addressing the merits of this appeal, we must resolve Molnar's motion to take judicial notice and to expand the record. Molnar seeks to supplement the record with fourteen documents that, he argues, demonstrate that he "was not afforded an opportunity to conduct discovery" due to an alleged direction from the district court that the parties hold discovery in abeyance.

Rule 10 of the Federal Rules of Appellate Procedure does not allow supplementation of the record in this case. *See S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982) (stating that the purpose of the rule is to correct "omissions from or misstatements in the record for appeal," and "not to introduce new evidence in the court of appeals"). Beyond a conclusory statement to the district court that summary judgment would be inappropriate because "discovery [was] yet to commence," Molnar did not attempt to submit these documents or otherwise argue the lack-of-discovery issue before the district court. He could have easily attached these documents with his motion to the district court. That he neglected

to do so does not justify supplementation under Rule 10(e).

We also decline to exercise our equitable powers to allow Molnar to supplement the record. *See Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003) (declining to supplement under our equitable powers). Given the absence of material disputed facts in this case and because the Defendants are entitled to judgment as a matter of law, allowing supplementation in this case would be inefficient and unnecessary.

B. Summary Judgment

Turning to the merits of Molnar's appeal, "[w]e conduct de novo review of decisions granting summary judgment, drawing all reasonable inferences in favor of the nonmoving party." *Johnson v. Karnes*, 398 F.3d 868, 873 (6th Cir. 2005).

1. Premature Grant of Summary Judgment

Molnar first claims that the district court prematurely granted summary judgment in favor of the Defendants, an argument raised for the first time on appeal. His oblique references to discovery made before the district court—first, his blanket observation that "discovery [was] yet to commence" in his motion opposing the City Defendants' motion to dismiss; and second, his statement in his motion opposing the Care House Defendants' motion for summary judgment that "discovery will provide additional evidence"—are not equivalent to raising the *issue* of premature motions for summary judgment. Molnar could have easily submitted a Rule 56(f) affidavit or, at the very least,

objected to the grant of summary judgment before the district court. He did neither, and we therefore deem his premature summary judgment claim waived. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008) ("[A]n argument not raised before the district court is waived on appeal to this Court.").

2. Section 1983

To survive summary judgment, Molnar must (1) demonstrate a genuine issue of material fact as to the deprivation of a federal right and (2) show that the deprivation was caused by a person acting under color of state law. *Johnson*, 398 F.3d at 873. Molnar alleges four deprivations of a federal right: (1) false arrest, (2) malicious prosecution, (3) violations of procedural and substantive due process, and (4) violation of equal protection. Because each of these alleged deprivations depend on Molnar's contention that there was no probable cause to prosecute him, the success or failure of his § 1983 claim rests on his ability to prove a lack of probable cause. The district court held that Molnar was collaterally estopped from re-litigating the issue of probable cause given the state court's ruling in the preliminary hearing that there was probable cause to prosecute him.

We apply state law to determine whether a state court's determination of probable cause at a preliminary examination prohibits re-litigation of the issue in a subsequent § 1983 action. *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001). "Under Michigan law, [collateral estoppel] applies when (1) there is identity of parties across the proceedings, (2) there was a valid, final judgment in the first proceeding, (3) the same issue was actually litigated

and necessarily determined in the first proceeding, and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. *Id.* (citing *People v. Gates*, 452 N.W.2d 627, 630-31 (Mich. 1990)). Only the "identity of the party" and the "same issue" requirements are at issue in the instant case.

The Care House Defendants and the City Defendants are the same party for purposes of collateral estoppel. "[O]ne of the 'critical factors' in applying collateral estoppel is the determination of whether the respective litigants were parties or privy to a party to an action in which a valid judgment has been rendered." *Gates*, 452 N.W.2d at 630. Here, assuming, *arguendo*, that the Care House Defendants are state actors,[4] they would necessarily act in privity with the City Defendants, with whom they are alleged to have conspired. *Id.* (holding that the state's Department of Social Services and a County Prosecutor were in privity and satisfied the "identity of the party" requirement). Thus, the "identity of the party" requirement is satisfied.

Molnar focuses his appeal on contesting the "same issue" requirement. He argues that because he disputes the legality of his arrest and the integrity of Pokely's investigation rather than the state court's finding of probable cause, collateral estoppel should not bar his claim. He cites *Darrah*, 255 F.3d at 301, and *Buttino v. City of Hamtramck*, 87 F. App'x 499

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[4] Since we resolve on collateral estoppel grounds, it is unnecessary for us to decide whether the Care House Defendants are state actors, and we decline to reach this question.

(6th Cir. 2004), in support. In *Darrah*, we held that collateral estoppel did not bar a § 1983 plaintiff's challenge because, under the facts, there was no identity of the issues. *Darrah*, 255 F.3d at 311. We noted that the plaintiff was not re-litigating the identical issue decided in the preliminary hearing –the existence of probable cause—but was instead seeking to demonstrate that the officer *knowingly* misstated material facts in order *to establish* probable cause. *Id.* at 311 (emphasis added). Thus, in *Darrah*, we proceeded to review the merits of the plaintiff's malicious prosecution claim, a claim we ultimately found lacking. *Id.* at 311-13.

Molnar argues that Officer Pokely (1) fabricated probable cause and (2) failed to disclose exculpatory information. As evidence of these claims, he points to Officer Pokely's failure to disclose in her police report that his girlfriend corroborated his statements and that Renee's brother was a pedophile. However, what was excluded from Pokely's police report is simply not material to resolving the issue of *whose* statements the state court relied on to establish probable cause. At the preliminary hearing, the Prosecutor called one witness, Elizabeth. Molnar, in rebuttal, called Renee, Pokely, and Allen. Even accepting Molnar's allegation that Detective Pokely "knowingly supplied the magistrate with false information," *Darrah*, 255 F.3d at 311, the state court did not rely on her testimony *to establish probable cause*. Rather, it bound him over for trial based on Elizabeth's "very believable" testimony. Thus, Molnar's reliance on *Darrah* is misplaced, because the state court relied on the victim's testimony to establish probable cause.

Since the state court did not rely on Detective Pokely's statements to establish probable cause, Molnar is left to argue that probable cause did not exist to bind him over for trial. This same issue was previously litigated in the preliminary hearing, and thus collateral estoppel bars Molnar from re-litigating it here. *Gates*, 452 N.W.2d at 630-31 (Mich. 1990). Thus, he cannot demonstrate a deprivation of a federal right,[5] and his § 1983 claim fails as a matter of law. *See Buttino*, 87 F. App'x at 505 (applying collateral estoppel where the state court did not rely on an officer's testimony to establish probable cause). His failure-to-train claim against the City of Troy fails as well.

3. Section 1985

Molnar also alleges that the Defendants engaged in a conspiracy to violate his federal constitutional right in violation of § 1985. Because he is collaterally estopped from contesting probable cause, his § 1985 claim similarly fails as a matter of law. Simply stated, he cannot demonstrate the existence of a conspiracy to

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[5] The application of collateral estoppel vitiates Molnar's false arrest, malicious prosecution, and equal protection claims. His procedural due process claim fails on separate grounds—namely, because the record demonstrates that he was given notice and the right to contest probable cause at the preliminary hearing. In addition, since he failed to argue the merits of his substantive due process claim on appeal, we deem it waived. *See Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 537 n.6 (6th Cir. 2002) (refusing to address issue raised for the first time in appellant's reply brief and that was not supported by any evidence in the record).

violate his federal rights if he cannot first demonstrate an underlying deprivation of a federal right.

4. Supplemental State-Law Claims

Molnar also brought several state-law claims, including intentional infliction of emotional distress. He alleges that Detective Pokely "turn[ed] a blind eye to all the exculpatory evidence in order to pin a heinous crime on Plaintiff—sexual molestation of his minor daughter." Given Molnar's inability to come forth with evidence beyond such conclusory allegations, we affirm the district court's ruling as to this issue.

III. Conclusion

Molnar's motion to supplement the record is **DENIED**. We **AFFIRM** the district court's grant of summary judgment for the Defendants.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 06-CV-15202-DT
Hon. Gerald E. Rosen

[Filed September 4, 2008]

GERALD MOLNAR,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CARE HOUSE (Child Abuse and Neglect Council of Oakland County), AMY ALLEN, JANICE POKELY, CITY OF TROY, and RENEE MOLNAR,	)
	)
Defendants.	)
	)

OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on September 4, 2008

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

This Section 1983 action is presently before the Court on the motion to dismiss and/or summary judgment filed by Defendants Janice Pokely[1] and the City of Troy, and the motion for summary judgment filed by Defendants Care House and Amy Allen. Both of these motions have been fully briefed by the parties. Having reviewed and considered the parties' briefs[2] and supporting evidence, the Court is now prepared to rule on this matter. This Opinion and Order sets forth the Court's ruling.[3]

II. PERTINENT FACTS

Plaintiff Gerald Molnar filed for divorce from his then wife, Renee Molnar, on February 8, 1998. The

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[1] In his Complaint, Plaintiff spelled this Defendant's name as "Pokely." However, in Defendants' motion, the Troy City Attorney spelled it "Pokley." For the sake of consistency, the Court will use the spelling used in the Complaint as that is the spelling used on the Court's docket of the case.

[2] The Court has reviewed all of the briefs, including the Supplemental Brief appended to Plaintiff's Motion for Leave to Supplement [Dkt. No. 49]. Accordingly, this Motion is hereby GRANTED.

[3] Oral argument was scheduled on this motion for August 28, 2008. However, when Plaintiff's counsel failed to timely appear for the hearing, the Court decided to forego oral argument. Accordingly, pursuant to Eastern District of Michigan Local Rule 7.1(e)(2), this matter will be decided on the briefs.

Molnars had four children together, three boys and one girl. According to the Amended Complaint in this action, soon after Plaintiff filed for divorce, Renee began accusing him of abusing their children. According to Plaintiff, these accusations began sometime in August of 1998 after Mr. Molnar expressed to Renee his concern about her brother, Brian Koch, a convicted sex offender, having access to their children. Renee allegedly responded to Mr. Molnar's concern by warning him, "You better watch out or you just might find yourself in the same boat one day." Plaintiff claims that after that date through May 1999, Renee made several allegations to the authorities that Plaintiff had sexually and physically abused their children. The authorities, however, found these allegations to be unsubstantiated.

Plaintiff's First Federal Lawsuit

Plaintiff thereafter filed a federal suit against Renee and various state actors claiming violations of his Constitutional rights. Plaintiff's claims in that case, *Molnar v. Lopez*, E.D. Mich. No. 00-75050, stemmed from actions taken by Renee in January 1999 who at that time entered the Molnars' oldest son, Alexander, into counseling with Oakland County Community Mental Health Authority ("OCCMHA") and allegedly "concealed the course of treatment" from Plaintiff. Mr. Molnar's theory in that case was that his ex-wife's actions violated the terms of their divorce decree and also that the various counselors and employees of the OCCMHA and the Oakland County Family Independency Agency (the "FIA") had conspired with his ex-wife to violate his Constitutional "right to parent" by damaging his relationship with his children. The Court (Roberts, J.), however, found that

Mr. Molnar had provided no evidentiary support for his conclusory allegations and, therefore, found that he failed to make out a cognizable federal constitutional claim. Accordingly, on March 4, 2002, the Court dismissed Plaintiff's federal claims, declined to exercise supplemental jurisdiction over his state law claims, and entered judgment in favor of the defendants.[4]

Circumstances Giving Rise to the Instant Action

On October 8, 2003, Renee Molnar went to the Troy Police station and reported that her ex-husband had touched their daughter Elizabeth (a/k/a "Libby") in a sexual manner. Renee's complaint was referred to Detective Janice Pokely. Renee then met with Detective Pokely and reported that her then nine-year-old daughter told her that her father had put his hand down her pants and "touched her vulva." Detective Pokely then asked Renee to write out a witness statement and return it the next day, which Renee did.

Detective Pokely thereafter advised Renee that Elizabeth would need to be interviewed at Care House.

Care House is a private non-profit agency engaged "solely [in] the advocacy, prevention, intervention and treatment of child abuse and neglect." [Care House Brief, p. 11.] Care House performs forensic interviews with children under the age of 13 for all of the 46 police jurisdictions in Oakland County and the

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[4] All of Judge Roberts' rulings were subsequently affirmed on appeal.

Department of Health and Human Services. Care House is used by the authorities so that interviews can be conducted in a less intimidating environment. Care House does not take private referrals and only accepts referrals and cases from law enforcement officials and Child Protective Services.[5] A portion of Care House's funding comes from Oakland County and other state agencies, and there are a number of community leaders and state officials who have seats on Care House's Advisory Committee.[6]

On October 16, 2003, Care House employee, Amy Allen, conducted an interview with Elizabeth. No other person was in the room with Elizabeth and Ms. Allen. However Detective Pokely, a crisis counselor, an Oakland County Assistant Prosecutor, and Care House Coordinator Jennifer Hay were able to observe the interview through a two way mirror. Elizabeth's

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[5] The "Oakland County Child Sexual Abuse Investigative Protocol" states that when the DHS or a law enforcement agency receives a report of alleged sexual abuse, the agency "should" contact Care House to begin coordinating efforts in the investigation. [See Plaintiff's Ex. D.] There is no indication in the record of the precise relationship between Care House and the county social welfare and law enforcement agencies (i.e., whether the relationship arises out of a contract, or some statute or regulatory authority). Further, although Defendants state that Care House may refuse to conduct an interview under certain "specific circumstances," these circumstances are not elucidated in any of the parties' briefs.

[6] Although Plaintiff's brief and exhibits show that there are Oakland County prosecutors, police officers (including Detective Pokely) and a number of judges who serve on the Care House Advisory Committee, none of the parties explain the purpose or power of the Advisory Committee or what influence it has over the day to day operations of Care House.

mother, Renee, however, in no way participated in, or viewed, the interview. The interview was neither video-taped nor audio-recorded, and the only record of the interview is from the observers.

During the interview, Elizabeth stated several times that Plaintiff had placed his hands down her pants and "touched her vulva." Elizabeth's statements were consistent and Detective Pokely and the other observers determined that Elizabeth was a credible witness.

After the interview was conducted by Amy Allen, both she and Care House concluded their involvement in the case. The authorities' only contact with these Defendants after the interview was a telephone call by the police to confirm that a prior case involving Plaintiff and his children had been closed as not substantiated. The only other contact these Defendants had with Elizabeth after the interview was Amy Allen's incidental contact with her while at subsequent court hearings.

On the same day as Elizabeth's Care House interview, Detective Pokely interviewed Plaintiff Molnar at his residence and delivered to him a motion for an emergency motion to determine visitation rights. At the time of this interview, Plaintiff was living with his friend, Mary Urban. When Detective Pokely explained the allegations to Plaintiff, he denied them and, in Detective Pokely's opinion, appeared "frustrated." Plaintiff also told Detective Pokely in this interview about his ex-wife's previous allegations of abuse and that all of these were found to be unsubstantiated.

Plaintiff claims that he explained to Detective Pokely during the interview that he moved in with Ms. Urban on the suggestion of his attorney, and that Ms. Urban was present at all times he was with his children. Ms. Urban confirmed Plaintiff's statement in an Affidavit she provided on May 19, 2007. Plaintiff also claims that he informed Detective Pokely that Renee's brother, Brian Koch, was a convicted pedophile and that he had objected several times to Brian having access to his children. He also claims that he informed Detective Pokely of the "threat" Renee had allegedly made when he had confronted her about her brother.

After the interview, Detective Pokely reviewed incident reports from other police departments that identified Plaintiff as a suspect in two other incidents involving acts that were sexual in nature.

An emergency hearing was conducted in the family division of the Oakland County Circuit Court concerning Plaintiff's visitation rights. After hearing testimony, on October 24, 2003, Referee Michael Hand suspended Plaintiff's visitation rights.

Detective Pokely thereafter reviewed all the information she had gathered, reduced it to a narrative report, and submitted the report to the Oakland County Prosecutor on November 24, 2003. In her narrative report, Detective Pokely included her knowledge of past unsubstantiated accusations made against Plaintiff. She also noted that Plaintiff was then living with Ms. Urban; however, she did not mention anything about Ms. Urban having indicated that she had seen no inappropriate behavior on the Plaintiff's part while the children were with him, or

the claim by Plaintiff that Renee's brother was a convicted pedophile.

On December 4, 2003, the Oakland County Prosecutor authorized a complaint and warrant charging Mr. Molnar with Criminal Sexual Conduct ("CSC"). Detective Pokely swore out the warrant in front of Magistrate Donald Chisolm and the Magistrate thereafter issued a warrant for Plaintiff's arrest. After Plaintiff was informed by his attorney that a warrant had been issued, he voluntarily turned himself in to the Troy Police Department on December 5, 2003.

On December 23, 2003, a three-hour preliminary examination was conducted. Elizabeth, Renee, Detective Pokely and Amy Allen all testified at this hearing, and Plaintiff's lawyer was able to cross-examine all witnesses. After the preliminary examination, Judge Drury determined that there was probable cause to charge Plaintiff with CSC and bound him over for a criminal trial.

During the pendency of the criminal proceedings, proceedings concerning Mr. Molnar and his children continued in the family court. A petition to terminate Mr. Molnar's parental rights was filed with the Oakland County Circuit Court by the Oakland County Prosecutor's Office and the Family Independence Agency in December 2003. On December 23, 2004, Judge Daniel O'Brien held a bench trial on the petition. After hearing Elizabeth Molnar's testimony, Judge O'Brien concluded that the "alleged victim . . . [was] credible and the Respondent. . . [was] not." [1/5/05 Opinion and Order; Defendants' Supplemental Ex. 8]. The Court found by a preponderance of the

evidence that Mr. Molnar had abused Elizabeth Molnar, terminated Mr. Molnar's parental rights, and made the children temporary wards of the court. *Id.*[7]

The criminal trial of Gerald Molnar took place in October 2005. The jury found Mr. Molnar not guilty of CSC. Plaintiff thereafter filed the instant action against Detective Pokely, the City of Troy, Care House, Amy Allen, and his ex-wife.

III. DISCUSSION

A. STANDARDS APPLICABLE TO MOTIONS FOR SUMMARY JUDGMENT

Summary judgment is proper "'if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c).

Three 1986 Supreme Court cases -- *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475

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[7] This temporary suspension of Mr. Molnar's parental rights was subsequently made permanent in March 2008 by Oakland County Circuit Judge Leo Bowman based upon Mr. Molnar's repeated failure to follow court orders, failure to participate in court-ordered counseling, and his general failure to accept responsibility or effectuate real changes in his behavior. Given all of these failures, the Court determined that the conditions which led to the original suspension of parental rights continued to pose a viable threat to the children with no likelihood of remediation in the near future. [*See* 3/8/08 Opinion and Order, Defendants' Supplemental Ex. 9.]

U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) -- ushered in a "new era" in the standards of review for a summary judgment motion. These cases, in the aggregate, lowered the movant's burden on a summary judgment motion.[6] According to the *Celotex* Court,

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof.

Celotex, 477 U.S. at 322.

After reviewing the above trilogy, the Sixth Circuit established a series of principles to be applied to motions for summary judgment. They are summarized as follows:

> " The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery,

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[6] "[T]aken together these three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials. . . ." 10A C. Wright, A. Miller, M. Kane, Federal Practice & Procedure 3d, § 2727.

has no evidence to support an essential element of his or her case.

[4] The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."

[5] The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.

[6] The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w]here the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Betkerur v. Aultman Hospital Association, 78 F.3d 1079, 1087 (6th Cir. 1996). *See also, Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989). The Court will apply the foregoing standards in deciding the Motions for summary judgment in this case.

B. PLAINTIFF'S CLAIMS AGAINST THE CARE HOUSE DEFENDANTS

In his Complaint, Plaintiff alleges that Amy Allen and Care House (the "Care House Defendants") (1) are state actors and are liable for the violation of his civil rights, including unlawful seizure, procedural due process, equal protection and conspiracy; and (2) liable to him for intentional infliction of emotional distress. The Care House Defendants counter that are not "state actors," and hence, they cannot be held liable under Section 1983. They further argue that even assuming they are state actors, they are still entitled to summary judgment because Plaintiff cannot show that the acts of these Defendants caused the deprivations of constitutional rights complained of. The also argue that Plaintiff has not made out a viable conspiracy claim under Section 1985. Finally, they argue that Plaintiff has failed to make out a legally cognizable claim of intentional infliction of emotional distress.

1. THE CARE HOUSE DEFENDANTS ARE NOT STATE ACTORS

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an

> action at law, suit in equity, or other proper proceeding for redress. . . .

Section 1983's purpose is to guard against the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ." *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299 (1941)). Two elements are necessary to state a cause of action under 42 U.S.C. § 1983. The plaintiff must plead and prove (1) that some person has deprived him of a federal right, and (2) that the person has done so under color of state law. *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 150 (1970).

Plaintiff Gerald Molnar contends that Defendants Amy Allen and Care House may be held liable under §1983 for his allegedly unlawful seizure, procedural due process failures, and his equal protection claim. However, as indicated, it is fundamental that only those acting "under the color of law" may incur liability under 42 U.S.C. §1983. A private party, however, may be deemed to be a "state actor" if the party's actions are "fairly attributable to the state." *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); *see also Black v. Barberton Citizens Hosp.*, 134 F.3d 1265, 1267 (6th Cir. 1998) ("To determine whether a party's action constitutes state action, we ask whether the party's action 'may be fairly attributable to the state.'").

Decisions as to whether a private action may be considered a "state action" are fact specific and are made on a case-by-case basis. There is no one determining factor, or set of circumstances, that cause a private action to be *per se* "under the color of law;"

therefore, a court must look to the specific facts of each case to reach a decision. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295-96 (2001) ("[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.").

Four tests have been used by the Supreme Court to determine whether the action by a private individual may by fairly attributable to the state. *See Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982). These tests are: (1) the public function test, *West v. Atkins*, 487 U.S. 42, 49-50 (1988); (2) the state compulsion test, *Adickes v. S.H. Kress & Co.*, 398 U.S. at 170; (3) the joint action test, *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); and (4) the symbiotic relationship or nexus test, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-26 (1961). The Sixth Circuit has only recognized, and Plaintiff only discusses in his brief, the public function, state compulsion, and symbiotic relationship/nexus tests.[9] [Plaintiff's Brief, pp. 3-6].

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[9] The Sixth Circuit does not recognize a separate "joint action" test to determine state action for purposes of Section 1983. "[T]his circuit recognizes three tests for determining whether its conduct is fairly attributable to the state: the public function test, the state compulsion test, and the nexus test." *American Postal Workers Union, Local 96 v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004), citing, *Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir.1992). Rather, it appears that in this Circuit, when it is alleged that a private party engaged in a joint activity with the State or its agents, the claim is dealt with as a conspiracy claim. *Id.* at 905-06.

Under the public function test, a private party is deemed to be a state actor if the powers exercised by that party have traditionally been exclusively reserved to the state. *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). The standard used under this test is rigorous, and "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" *Flagg Brothers Inc. v. Lefkowitz*, 436 U.S. 149, 158 (1978). The state compulsion test involves determining whether the state has exercised such coercive power, or control over the defendant, that in law, the choice of the private actor is deemed to be that of the state. *Campbell v. PMI Food Equipment Group, Inc.*, 509 F.3d 776, 784 (6th Cir. 2007); *Wolotsky v. Huhn*, *supra* ("More than mere approval or acquiescence in the initiatives of the private party is necessary to hold the state responsible for those initiatives."). Under the joint action test, a private party and the government share a common unconstitutional goal to deprive a person of their constitutional rights, and the private party is a willing participant. *See Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1446-47 (10th Cir. 1995). Finally, under the symbiotic relationship or nexus test, a §1983 claimant must "demonstrate that there is a sufficiently close nexus between the government and the private party's conduct so that the conduct may be fairly attributed to the state itself." *Chapman v. Higbee Co.*, 319 F.3d 825, 834 (6th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004).

Even though a private entity may receive large amounts of public funding, and receive clients through state agency referrals, those elements do not necessarily make the private entity a state actor. In *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), New

Perspectives School, a private nonprofit entity, was sued under §1983 for allegedly improperly discharging employees. In that case, the plaintiffs alleged that the state significantly influenced the school, such that the discharge of employees could be deemed a state action. The students at New Perspectives were generally there by referral from the state, the school received 90 percent of its operating budget from public funds, and the majority of contracts the school entered into were with government agencies. *Id.* at 831-34, 840-42. The school was also required to comply with various local and state regulations to be eligible for public funds, but no person on its board of governors was a state employee or appointed by the state, and the school could refuse to accept any student. *Id.* Notwithstanding the foregoing, the Court held that the school was *not* a state actor. *Id.* at 841-42. The Court rejected the argument that the school was a state actor because of the receipt of public funding. The Court also stated that while there were regulations and contracts with the state regarding the acquiring of students, there was no evidence that those regulations coerced, controlled, or influenced decisions to discharge employees. *Id.*

Plaintiff here first argues that Defendants are state actors under the public function test. He argues that "forensic interviews" and investigations of potential crimes are "essential and/or integral part[s] of the State's obligation;" thus, he contends that because Defendants in this case performed that function they are state actors under the public function test. [Plaintiff's Brief, pp. 3-4.] However, merely performing an essential or integral function of the state does not cause that person to be a state actor under this test. The power exercised by a private

person must have been a power traditionally *exclusively* reserved to the state. Though governments traditionally perform investigations and "forensic interviews," those acts have not been exclusively within the power of the state. There are many private investigators, and social workers, who perform investigative interviews. One might rightly argue that charging a person with a crime meets the public function test, but the Care House Defendants here did not charge Mr. Molnar with a crime; the Defendants merely interviewed Libby. Therefore, Defendants are not state actors under this test.

Plaintiff also contends that Care House and Amy Allen are state actors under the state compulsion test. Mr. Molnar claims that several connections between the State and Care House show that the State exercised enough coercive power, or provided significant encouragement, to find that Amy Allen's interview of Libby amounted to an action by the State. Plaintiff points to the following: 1) Care House only accepts clients through state agencies, 2) the protocol of Oakland County law enforcement agencies requires that they refer adolescents under the age of 13 to Care House, 3) Care House receives funding from state agencies, and 4) state employees are allowed to observe the interview.

As discussed above, in *Rendell-Baker*, the Court held that receipt of public funds, being a party to a government contract, and government referrals failed to prove that the state controlled or coerced the defendant to act in a certain way. 457 U.S. at 841-42. Similarly, in *Robert v. Stetson School, Inc.*, 256 F.3d 159 (3rd Cir. 2001), the court found that despite the facts that the defendant received a majority of its

budget from public funds, the school obtained students through state referrals, and a majority of its contracts were with state agencies, the school was not a state actor. *Id.* at 162-63, 169. The court noted that no state employees or agencies influenced the day-to-day activities of the school, and that the school "had full control over its admissions process." *Id.* at 162-66.

In light of the *Rendell-Baker* and *Robert* decisions, none of the facts presented by Plaintiff in favor of this test are particularly relevant to the state compulsion test.

The only arguable connection with the state that might provide some basis for application of the state compulsion test is Detective Pokely's membership on the Care House Advisory Committee. However, there has been virtually no evidence provided regarding Care House's Advisory Committee or Detective Pokely's role on the Committee. It is known that there are a number of civic leaders and state employees on the Advisory Committee, but the Court has not been provided any information as to the Committee's control over Care House's day-to-day operations or activities, in general, or the conduct of forensic interviews, in particular. Therefore, there is no evidentiary basis for the Court to conclude that the state has exercised such coercive power or control over the Care House Defendants to render them "state actors" under the state compulsion test.

The same issues above also apply to the symbiotic relationship/nexus test. Mr. Molnar argues that the state was intimately involved in the interview with Libby, and that there is a sufficient nexus between Care House and the State to find that Defendants

were state actors. Mr. Molnar argues that evidence showing that a portion of Care House's funding comes from state, that state agencies are listed as "Community Partners" and that state employees, including judges and police officers, serve on Care House's Advisory Committee is sufficient to raise an issue of material fact regarding whether Care House is a state actor under this test. As the authorities discussed above demonstrate, Mr. Molnar's theory is not supported by the law. Far more than public funding and service by state employees on an advisory committee is required to establish a sufficiently close nexus between the government and the private party's conduct to trigger the § 1983 symbiotic relationship/nexus test. As the New York Supreme Court noted in *People v. Wilhelm*, 822 N.Y.S. 2d 786 (2006),

> Relevant indicia of state involvement which may transform private conduct into state action include: a clear connection between the police and the private investigation; completion of the private act at the instigation of the police; close supervision of the private conduct by the police; and a private act undertaken on behalf of the police to further a police objective.

Id. at 792, quoting *People v. Greene*, 760 N.Y.S.2d 769 (2003).

Here, although the Troy police referred Elizabeth to Care House, there is no evidence of record suggesting that the police or the prosecutor's office supervised, directed or otherwise participated in her interview. While it is true that the authorities were able to observe the interview, they did not participate

in the questioning. And, once Amy Allen completed her interview of Elizabeth, her role in this matter -- and Care House's role, as well -- ended.

In sum, the Court finds insufficient evidentiary support for Plaintiff's contention that Defendants Amy Allen and Care House were "state actors" so as to render them potentially liable under 42 U.S.C. § 1983.

2. EVEN ASSUMING *ARGUENDO* THAT THE CARE HOUSE DEFENDANTS WERE STATE ACTORS, THEY ARE STILL NOT LIABLE UNDER § 1983

(a) The Care House Defendants' Actions Were Not the Proximate Cause of Plaintiff's Alleged Injuries

General principles of tort law govern liability imposed by § 1983. *Horn by Parks v. Madison County Fiscal Court* 22 F.3d 653, 659 (6th Cir. 1994) (holding that a "proximate causation is an essential element of a §1983 claim for damages."). The causation requirement in §1983 is not satisfied by mere causation in fact; the plaintiff must also establish proximate causation. *Sutkiewicz v. Carlson*, 850 F.Supp. 579, 588 (E.D. Mich. 1994) (quoting *Arnold v. International Business Machine Corp.*, 637 F.2d 1350 (9th Cir. 1981)), *rev'd on other grounds by Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352 (6th Cir. 1997). In *Sutkiewicz*, this Court stated that in a §1983 action, the proximate cause of a plaintiff's injury for false imprisonment would ordinarily be the court order committing him to the psychiatric facility, and that generally, the various preliminary steps leading to the court order are only remote causes of the injury and do

not rise to proximate or legal causation. *Id.* at 588-89 (quoting *Houston v. Humboldt County*, 561 F.Supp. 1124 (D. Nev. 1988)).

In *Sutkiewicz*, the plaintiff who had been arrested for murder was thereafter held in a mental hospital for ten years pursuant to a court order finding him to continue to be incompetent to stand trial. After he was released from the hospital and the charges against him dropped, the plaintiff brought an action under §1983 claiming that his civil rights had been violated by the detectives who had investigated the murder when they failed to turn over potentially exculpatory evidence to the judge presiding over his case and the psychiatrists who had ordered his continued detention. The detectives claimed that their actions in investigating the murder were merely preliminary steps to the court's continued detention order and, therefore, they could not be held liable under §1983. *Id.* at 581-87. However, this Court declared that "situations involving the presentation of false evidence or the withholding of evidence are exceptions to the general rule that . . . a court order breaks the chain of causation." *Id.* at 589 (quoting *Ames v. United States*, 600 F.2d 183 (8th Cir. 1979)). In that case, the defendants' motion to dismiss was denied since there was a question of fact as to whether the detectives had withheld information that would have allowed the plaintiff to exit the mental hospital sooner. *Id.* at 591.

By contrast, here, by (1) interviewing Elizabeth on October 16, 2003, (2) informing Troy Police that another abuse claim file involving Mr. Molnar and his children had been closed as unsubstantiated, and (3) testifying as a witness for Mr. Molnar at the preliminary hearing on December 23, 2003, the Care

House Defendants merely conducted preliminary acts. As a general rule it is the overt acts, not the preliminary acts, that are the proximate cause of the injury in a §1983 claim. In this case, the overt acts were first, the decision by the Oakland County Prosecutor to file criminal charges against Plaintiff, and second, the ruling by Judge Drury that there was probable cause to bind Plaintiff over for trial. These acts break any link of causation as to the actions of the Care House Defendants.

Plaintiff does allege that Amy Allen conspired with other Defendants to provide false information and withhold exculpatory evidence, and that she lied when she testified that after her one interview with Libby, Ms. Allen had no further contact with her (other than incidental contact in the courtroom). As evidence of this allegedly false testimony, Plaintiff has submitted a Protective Services "Updated Service Plan" that indicated that Elizabeth's case file with Care House was "open" from 10/19/2003 to 01/19/2004, i.e., well after Libby's interview with Amy Allen. [Plaintiff's Exhibit J]. However, a full review of the record shows that although the Care House file remained open, there was no further contact with Elizabeth. Therapy information records show that Care House did telephone Renee Molnar and suggested that Libby receive long term therapy from a source other than Care House. [Defendants' Exhibit 2, p. 12]. Renee, however, requested another appointment with Care House before Libby's long term therapy with the other provider began, and an appointment with Care House was scheduled for November 26, 2003. *Id.* However, Libby and Renee did not keep the appointment and never set up another. *Id.* The file was then closed on January 19, 2004 with an entry stating that all of the

Molnar children had a non-Care House long-term therapist and that therapy at Care House never started. *Id.*

Plaintiff also claims that Defendants withheld knowledge of the history of false accusations made by Renee; however, there is evidence of record indicating that Care House did inform police that a prior allegation had been closed as unsubstantiated. [Plaintiff Brief, p. 10; Defendant Exhibit 3, ¶11].

Because there is no other evidence supporting an allegation that Defendants provided false information or withheld exculpatory evidence, the general rule as to causation applies and Defendants' preliminary acts did not rise to the level of proximate cause. The causal link between the interview conducted by Amy Allen and the Plaintiff's alleged injuries was broken by the decisions of the prosecutor and Judge Drury.

(b) Plaintiff Has Failed to Provide Evidence of a Conspiracy and Has Failed to Plead or Prove that Defendants Acted with a Class-Based Animus

Mr. Molnar also contends that Care House and Amy Allen conspired with the other Defendants to violate his constitutional rights.

42 U.S.C. § 1985 provides a private cause of action for "conspiracy to interfere with civil rights." 42 U.S.C. § 1985(3) provides for the recovery of damages caused by persons who conspire "for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws,"

and the relevant part §1985(2) prohibits "two or more persons conspir[ing] for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws." 42 U.S.C. § 1985(2). The statute provides for the recovery of damages occasioned by such a deprivation of rights.

To succeed under a §1985 conspiracy claim, a plaintiff must prove "(1) a conspiracy [among two or more persons]; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 314 (6th Cir. 2005) (quoting *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983)). To overcome summary judgment, "conspiracy claims must be pled with some degree of specificity and . . . vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim." *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 832 (6th Cir. 2007).

Courts have found that the relevant portions of § 1985 require a plaintiff who brings a claim for a civil rights conspiracy to also plead and prove that the conspiracy has "some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Radvansky*, 395 F.3d at 314 (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)); *see also Peters v. Fair*, 427 F.3d 1035, 1038

(6th Cir. 2005) (holding that because the plaintiff did not provide evidence showing that the conspiracy was motivated by racial or other class-based animus the district court properly dismissed the civil rights conspiracy claim).[10]

The facts in this case certainly demonstrate that the various Defendants had been involved with the Molnars over a period of several years. Further, the record evidence shows that it is protocol for law enforcement in Oakland County, Care House, and the Department of Human Services to collaborate on child sexual abuse cases. [See Plaintiff Exhibit D]. However, the Plaintiff's allegations that Defendants conspired together to injure Mr. Molnar appear to be mere conjecture.

Plaintiff claims that Care House and Amy Allen met with Libby on more than one occasion and suggests that during those additional meetings

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[10] *But see, Kush v. Rutledge*, 460 U.S. 719, 724-27 (1983). In *Kush*, the Supreme Court stated that a plaintiff is not required to plead that the conspiracy was motivated by racial or other class-based animus if the conspiracy claim is brought under the first part of 42 U.S.C. § 1985(2). The first part of § 1985(2) is not implicated in this case. It relates to obstruction of justice in federal courts and contains no requirement of equal protection. However, in our case Mr. Molnar's claim stems from an alleged conspiracy in a state court action, not a federal court. Thus, only the second part of § 1985(2) is implicated and Mr. Molnar must plead that the conspiracy was motivated by racial or other class-based animus. *See also, Wright v. Illinois Dept. of Children & Family Services*, 40 F.3d 1492, 1507 (7th Cir. 1994) ("While a plaintiff must allege class-based animus to state a claim for denial of access to state courts, no such requirement exists for an action asserting denial of access to federal courts.")

Defendant Allen coached Libby how to testify against Mr. Molnar. However, Plaintiff has provided no evidence to support those allegations while Defendants have provided patient records clearly refuting the allegation that Libby came to Care House after the one forensic interview. [*See* Defendants' Exhibit 2, p. 12]. Plaintiff also claims that Defendants conspired during meetings with law enforcement officials to deprive Mr. Molnar of constitutional rights. However, again, Plaintiff offers no specific facts regarding these alleged meetings. The evidence submitted only shows that it is protocol for Care House and law enforcement to coordinate their investigations. [*See* Plaintiff's Exhibit D].

Finally, Plaintiff has neither plead nor proven that the alleged conspiracy was motivated by a racial or other class-based animus, nor has he shown that he was deprived of a constitutional right.

In sum, the Court concludes that Plaintiff has failed to make out any legally cognizable federal claim against the Care House Defendants.

C. PLAINTIFF'S CLAIMS AGAINST THE MUNICIPAL DEFENDANTS

Plaintiff alleges that the municipal defendants, Detective Janice Pokely and the City of Troy, violated his Fourth Amendment rights and his Fourteenth Amendment rights to due process and equal protection due to the criminal investigation conducted with regard to his daughter's allegations of sexual touching. Specifically, he contends that he was charged and arrested without probable cause. He also alleges that these Defendants conspired with the Care House

Defendants and his ex-wife to violate his constitutional rights. He also alleges that these Defendants, like the Care House Defendants, are liable to him for intentional infliction of emotional distress. Defendants counter that Plaintiff has failed to state any constitutional claim based upon the actions of Detective Pokely and the City of Troy. In particular, the Municipal Defendants maintain Plaintiff's claims are barred by collateral estoppel. They also argue that because Detective Pokely had probable cause to seek a warrant Plaintiff has no legally cognizable cause of action for unlawful seizure or violation of due process. They further argue that even if Plaintiff has stated a claim, Detective Pokely is entitled to qualified immunity.

1. THE DOCTRINE OF COLLATERAL ESTOPPEL PRECLUDES PLAINTIFF FROM ATTACKING PROBABLE CAUSE BECAUSE THE STATE COURT ALREADY MADE A VALID FINAL JUDGMENT THAT PROBABLE CAUSE EXISTED IN A CRIMINAL PROCEEDING AND PLAINTIFF HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE THE ISSUE DURING THE PRELIMINARY EXAMINATION.

Defendants first argue that Plaintiff is precluded from pursuing his unlawful arrest claims in this lawsuit because the state court ruled on the issue of probable cause. Defendants contend that Plaintiff was given an opportunity to contest the issue of probable cause at the preliminary exam hearing and is, therefore, foreclosed from relitigaing the issue.

Plaintiff argues that the issue of probable cause is not collaterally estopped because the issue brought

before this court is not the same issue that was actually litigated and necessarily determined in the state court. Plaintiff contends that the "issue of the *legality of Plaintiff's arrest* and the *integrity of the police investigation* was not litigated and/or determined at the state court's preliminary hearing." (Plaintiff's Brief in Response, p. 11). Plaintiff cites several cases for the proposition that a claim challenging the integrity of the evidence, or a claim asserting that the police acted in bad faith is not collaterally estopped by a finding of probable cause in the state court.[11]

This Court must apply Michigan law in determining whether the state court's determination of probable cause at the preliminary hearing has preclusive effect. *Haring v. Prosise*, 462 U.S. 306, 313-14 (1983) (federal courts are generally required "to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.") Under Michigan law, collateral estoppel applies where 1) there is identity of parties across the proceedings, 2) there was a valid, final judgment in the first proceeding, 3) the same issue was actually litigated and necessarily determined in the first proceeding, and 4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding. *People v. Gates*, 434 Mich. 146, 154-57, 452 N.W.2d 627, 630-31 (1990), *cert. denied*, 497 U.S. 1004 (1990).

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[11] *E.g. Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001)

Further, where "the state affords an opportunity for an accused to contest probable cause at a preliminary hearing and the accused does so, a finding of probable cause by the examining magistrate or state judge should foreclose relitigation of that finding in a subsequent § 1983 action." *Smith v. Thornburg*, 136 F.3d 1070, 1077 (6th Cir. 1997); *Gaddis v. Redford*, 188 F. Supp. 2d 762 (E.D. Mich. 2002) (Motorist was collaterally estopped from asserting that police lacked probable cause to arrest him, as required for claim of false arrest; probable cause, under Michigan law, was found during motorist's preliminary hearing, at which he had counsel and full and fair opportunity to litigate issue).

There are, however, occasions where a finding of probable cause in a state court preliminary hearing will not preclude a plaintiff from litigating a federal claim in federal court. When a plaintiff alleges a police officer acted in bad faith, provided false information, or misstated material facts in order to establish probable cause, collateral estoppel will not apply. *Taylor v. City of Detroit*, 368 F. Supp. 2d 676 (E.D. Mich. 2005) (collateral estoppel will not apply to finding of probable cause at preliminary examination if plaintiff's false arrest claim under § 1983 is based upon officer supplying false information); *Buttino v. City of Hamtramck*, 87 Fed. Appx. 499, 504 (6th Cir. 2004) (action alleging bad faith by police officer challenges integrity of evidence rather than sufficiency of evidence); *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (holding that the state court's determination of probable cause at the preliminary hearing was not identical to the issue of whether Officer Bragg made materially false statements to the state judge that formed the basis of the probable cause determination.).

Nevertheless, even though a plaintiff might be allowed to bring a claim relying on a police officer's bad faith, misrepresentation of facts, or supplying false information, he still must provide evidence to support his claim or it will be dismissed. *Buttino*, 87 Fed. Appx. at 504.

In this case, there is identity of parties across the proceedings;[12] second, after a preliminary hearing the state court made a finding that there was probable cause to charge the Plaintiff with Criminal Sexual Misconduct (CSC); and third, there is no contention by Plaintiff that he was not given a full and fair opportunity to litigate the issue in the preliminary hearing. However, Plaintiff states that in this case he is attacking the "integrity of the police investigation" and not merely the issue of probable cause. Viewing this in the light most favorable to the Plaintiff, he can be seen as claiming that Detective Pokely either acted in bad faith, provided false information, or misstated material facts to establish probable cause.

There is, however, no evidence showing Detective Pokely provided false information. Plaintiff also fails to provide evidence supporting a claim of bad faith; therefore, the question is whether Detective Pokely misstated facts, or purposely left out certain facts, in order to show probable cause. The argument which

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[12] *See Buttino v. City of Hamtramck*, 87 Fed. Appx. at 505 n.4 (noting that Michigan courts have held that identity of parties exists when the first suit was a criminal matter and the second suit is a civil matter); *see also Knoblauch v. Kenyon*, 163 Mich. App. 712, 415 N.W.2d 286, 723 (1987) ("Michigan courts have similarly repudiated the mutuality requirement in the criminal to civil context.")

appears many times in Plaintiff's brief and complaint is that Detective Pokely's knowledge of Renee's past unsubstantiated claims, Renee's pedophile brother, and that Ms. Urban was with him at all times the children were in his presence foreclosed the possibility of Detective Pokely having probable cause. In the narrative report Detective Pokely submitted to the prosecutor, she made known that the family had previous contacts with Child Protection Services, that Renee had previously made accusations of this nature that were found to be unsubstantiated, and that the Plaintiff was living with Ms. Urban so that children could visit him. [Defendants' Exhibit 1 at pp. 6, 9]. Detective Pokely did fail to mention Ms. Urban's statement that she was with the Plaintiff at all times and saw no inappropriate behavior on the part of the Plaintiff; she also failed to mention that Renee's brother allegedly was a pedophile. However, Plaintiff was in possession of that evidence and had ample opportunity to bring that evidence to the judge's attention at the preliminary exam.

Because the evidence when viewed in the light most favorable to the Plaintiff fails to support the allegation that Detective Pokely acted in bad faith, provided false information, or misstated material facts to establish probable cause, collateral estoppel bars his claim challenging the constitutionality of his arrest. Summary judgment is, therefore, proper.

2. THERE WAS PROBABLE CAUSE TO ARREST AND CHARGE PLAINTIFF MOLNAR

Assuming *arguendo* that Plaintiff's Fourth Amendment false arrest claim is not barred by collateral estoppel, Defendants assert that there was

probable cause for the arrest and, therefore, no Fourth Amendment violation occurred. Defendants contend that statements from the victim Elizabeth Molnar, bolstered by corroborating evidence, clearly support probable cause. In support, Defendants rely on *Ahlers v. Schebil*, 188 F.3d 365 (6th Cir. 1999). Plaintiff counters that probable cause was lacking because (1) other than Libby, the alleged victim, there was no eye witness to the alleged sexual misconduct, (2) Detective Pokely carried out an incomplete and poorly conducted investigation, and (3) Detective Pokely failed to disclose exculpatory evidence to the district court.

In order to determine whether probable cause existed, the court must look at the "totality-of-the-circumstances" and determine whether the facts and circumstances within the officer's knowledge at the time of the arrest, of which he or she had reasonably trustworthy information, were sufficient to warrant an objectively reasonable officer to believe that the plaintiff had committed or was committing an offense. *United States v. Romero*, 452 F.3d 610, 615–16 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 1320 (2007). An officer must show more than mere suspicion, but is not required to "possess evidence sufficient to establish a *prima facie* case at trial, much less evidence sufficient to establish guilt beyond a reasonable doubt." *Id.* If facts are in dispute that would raise the issue whether or not probable cause actually existed, summary judgment is inappropriate. *Ahlers v. Schebil*, 994 F. Supp. 856, 872–73 (E.D. Mich. 1998), *aff'd*, 188 F.3d 365 (6th Cir. 1999). Also, a previous finding of probable cause by a state court is given considerable weight. *See Smith v. Thornburg*, 136 F.3d 1070, 1077 (6th Cir. 1997) ("[A] finding of probable cause by the examining magistrate

or state judge should foreclose relitigation of that finding in a subsequent § 1983 action.").

(a) Detective Pokely's Reliance on Elizabeth's Statement Accusing the Plaintiff of Sexual Misconduct to Establish Probable Cause was Proper Since Elizabeth was the Victim and was Believed to have had First Hand Observations of the Crime, and Elizabeth's Statements were Consistent and All Authorities Involved Viewed Her as a Credible Witness

A victim's eyewitness statements "based on firsthand observations . . . are generally entitled to a presumption of reliability and veracity," and law enforcement officers are "entitled to rely on an eyewitness identification to establish adequate probable cause with which to sustain an arrest." *Ahlers v. Schebil*, *supra*, 188 F.3d at 370.

When probable cause is established from a statement by an eyewitness, the individual attacking probable cause must provide evidence that the law enforcement officers had reason to believe the testimony of the witness was untruthful or unreliable. In *Ahlers*, a female prisoner accused a police officer of sexual misconduct. The investigating officers relied on the alleged victim's eyewitness testimony to establish probable cause and obtained a warrant to arrest Officer Ahlers. After charges were dropped, Ahlers sought damages under 42 U.S.C. § 1983 and argued that he had been charged and arrested without sufficient probable cause. *Id.* at 369. In that case, the court found that law enforcement officers may properly rely on firsthand testimony from a victim to establish probable cause. The court stated that Ahlers was

required to provide evidence that the defendants had reason to believe the victim's testimony was untruthful or unreliable in order to sustain a claim that there were genuine issues of fact regarding the existence of probable cause. *Id.* at 370-371 ("An eyewitness identification will constitute sufficient probable cause unless, at the time of the arrest, there is an apparent reason for the officer to believe that the eyewitness was lying, [or] did not accurately describe what he had seen . . .") (internal quotations omitted). Because Ahlers submitted no evidence to support a claim that the victim's testimony was untruthful or unreliable, the court found that there was probable cause. *Id.* at 371.

When a child victim gives inconsistent statements about an accusation of sexual abuse, the child's accusation alone may not be enough to establish probable cause. In *Cleary v. County of Macomb*, No. 06-15505, 2007 WL 2669102, *1 (E.D. Mich. 2007), the plaintiff's ex-girlfriend accused him of sexually abusing their young daughter. During interviews with police officers, and psychologists, the daughter made inconsistent statements regarding the alleged sexual abuse. *Id.* at *2-4. The daughter told authorities she felt like she was being forced to testify by her mother, and several individuals felt the daughter was a "weak witness;" however, the county still went through with the charge and arrest. *Id.* at *4-5. The daughter was also inconsistent in her trial testimony. *Id.* at *5. Relying on *Ahlers*, the county argued that the child's accusations were sufficient to establish probable cause. However, after reviewing the facts, the trial court distinguished that case from *Ahlers*, and concluded that the inconsistent accusations from the child-victim

alone could not definitively provide the basis for probable cause. *Id.* at *18.

In this case, during an interview on October 16, 2003, Elizabeth stated that her father, the Plaintiff, placed his hands down her pants and "touched her vulva." Though, like the alleged victim in *Cleary*, Elizabeth was a child when her statements were made, unlike *Cleary*, there is no evidence that any of the investigating officers viewed, or should have viewed, Elizabeth's testimony as untruthful, unreliable, or inconsistent. All the evidence presented shows that Elizabeth made no contradictory statements during her interview, and all those involved viewed her as a credible witness. Officer Pokely, therefore, was entitled to rely on Elizabeth's statements to establish probable cause.

(b) Detective Pokely was Under No Obligation to Continue an Investigation into Exculpatory Evidence Once Probable Cause was Established; Therefore, Since the Evidence Actually Possessed by Detective Pokely at the Time of the Plaintiff's Arrest Supported Probable Cause, the Thoroughness of the Investigation Does Not Bring the Finding of Probable Cause into Question.

Once a law enforcement officer has "probable cause" he is under no duty to continue the investigation to determine whether exculpatory evidence existed, and is under no obligation to investigate, or give credence to, a suspect's story or alibi. *Ahlers*, 188 F.3d at 371. *See also Logsdon v. Hains*, 492 F.3d 334 (6th Cir. 2007) ("After a law enforcement officer determines, on the basis of the

facts and circumstances known to him, that probable cause exists to support an arrest, the officer has no further duty to investigate or to search for exculpatory evidence.")

The question for a court reviewing a question of probable cause is not whether the law enforcement officers conducted a thorough investigation, but whether the totality of evidence actually in the possession of the officers would lead an objectively reasonable officer to conclude the individual committed a crime. In *Ahlers*, the plaintiff contended that the defendants' failure to conduct a thorough investigation constituted a reckless disregard for truth and brought into question the finding of probable cause. *Ahlers*, 994 F. Supp. at 875–76. It was admitted by an investigating officer that a "thorough" investigation had not been conducted.[13] *Id.* at 876. This Court found that the mere fact an investigation is not "thorough" does not determine *per se* that an individual's constitutional rights have been violated, and held that though officers could have conducted a more professional investigation, probable cause had been established. *Id.* at 876–77. Later, on appeal, the Sixth Circuit affirmed this holding, but stated that this finding did not mean officers may "make hasty, unsubstantiated arrests with impunity." *Ahlers*, 188 F.3d at 371. The question is whether the evidence in totality, known to the officers at the time of arrest, would lead an objectively reasonable officer to conclude

[13] According to an officer in *Ahlers*, a thorough investigation would have included interviewing witnesses, collecting evidence, photographing the scene, collecting any tangible evidence, and preserving evidence. 994 F. Supp. at 876.

there was probable cause, not whether a professional and thorough investigation had been conducted. *Id.* at 371–72. A determination of probable cause is based upon information the officer actually had, rather than information he could have had if he had continued to gather further evidence. *Id.* at 371 (citing *Crisp v. City of Kenton*, 142 F.3d 432 (6th Cir. 1998)). However, if officers actually possessed exculpatory evidence that would have led a rational officer to conclude he or she lacked probable cause, but simply turned a "blind eye" to the evidence in its investigation, summary judgment is improper. *Ahlers*, 188 F.3d at 372.

The question is not whether Detective Pokely conducted a thorough and professional investigation; rather, it is whether a reasonable officer would have concluded there was probable cause at the time of the arrest, given the totality of the evidence actually known to Detective Pokely. The evidence actually known to Detective Pokely at the time of arrest was (1) Elizabeth's eyewitness statement, (2) evidence that Elizabeth and Plaintiff had contact during the time period in which the alleged incident occurred, (3) evidence that Renee had in the past made unsubstantiated claims, but not Elizabeth, (4) evidence that Plaintiff lived with Ms. Urban, who he claimed was with him at all times he was with his children, 5) a claim by Ms. Urban that she had seen no inappropriate conduct by Plaintiff, and 6) evidence that Plaintiff claimed Renee's brother was a pedophile.

In view of the facts actually known to Detective Pokely at the time of the arrest, an objectively reasonable officer would have believed Plaintiff committed a crime. Elizabeth's statement together

with the knowledge that Elizabeth and Plaintiff had contact during the time period in question, established probable cause. The evidence Plaintiff provides in his favor is not sufficient to invalidate probable cause. The unsubstantiated claims proffered by Renee do not cause Elizabeth's statements to become unreliable, especially where the interview in which the statements were made did not involve Renee.

Further, Detective Pokely was under no duty to investigate, attempt to substantiate, or believe the alibis given by Plaintiff. It is understandable for an objective officer to question the claim that Ms. Urban was with Plaintiff at all times he was with his children. Additionally, Pokely was under no duty to track down Brian Koch and further investigate his activities. In further support of this conclusion, the judge also concluded that the evidence supported probable cause, and Plaintiff had ample opportunity to bring all evidence to the judge's attention during the preliminary exam. When weighed against Elizabeth's statement, the possible exculpatory evidence would not alter an objectively reasonable officer's view that probable cause existed at the time of Plaintiff's arrest.

(c) Detective Pokely was Not Required to Turn Over Exculpatory Evidence Where Plaintiff was in Possession of All Exculpatory Evidence and None of the Exculpatory Evidence was "Material."

Law enforcement officials are constitutionally required to turn over "material" exculpatory evidence. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court found that when the prosecution suppresses evidence favorable to an accused, there is

a violation of due process where the *evidence is material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. In *United States v. Agurs*, 427 U.S. 97 (1976), the Court extended this principle and held that the prosecution has a constitutional duty to volunteer exculpatory matter to the defense, even in the absence of a specific request for *Brady* material.

What must be determined in deciding whether certain alleged "exculpatory" evidence was improperly withheld in the determination of probable cause is: (1) was the evidence actually within the knowledge of law enforcement officers; (2) whether the evidence was actually withheld, (3) whether the evidence was favorable to the accused, and (4) whether the evidence excluded was "material." *Ahlers*, 188 F.3d at 371 (only evidence actually within the knowledge of the investigating officers at the time of the arrest, not potential evidence officers could have had if the investigation had continued, is used by a court to determine whether an officer had probable cause). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Plaintiff claims that Detective Pokely withheld exculpatory evidence and this negated any probable cause. The alleged evidence the Plaintiff argues is exculpatory is 1) Detective Pokely's knowledge of the unsubstantiated claims made by Renee, 2) Plaintiff's statement that Renee had a brother who was a pedophile, and 3) Ms. Urban's statement that she was with the Plaintiff at all times Elizabeth was present

and saw no inappropriate conduct by Plaintiff. As indicated, Detective Pokely was only required to offer exculpatory evidence if she had actual knowledge of the evidence and it was "material."

First of all, Detective Pokely submitted evidence regarding the prior unsubstantiated claims in her narrative report to the county prosecutor, and therefore that evidence was not improperly withheld by her. Second, though the Plaintiff informed Detective Pokely of Renee's pedophile brother, Detective Pokely was under no duty to substantiate his claim or investigate Brian Koch with regard to establishing probable cause as to Mr. Molnar. Because Detective Pokely did not investigate the matter, she had no actual evidence regarding Brain Koch. Lastly, with regard to Ms. Urban's statement that she was with the Plaintiff at all times and saw no inappropriate behavior between Elizabeth and Plaintiff, Detective Pokely was under no duty to give credence to Ms. Urban's statement in her determination of probable cause. It also should not be forgotten that Plaintiff had knowledge of this alleged "exculpatory" evidence and had the opportunity to submit the evidence himself to the Judge at the probable cause hearing.

It is also doubtful that Plaintiff's claim that Renee had a pedophile brother and Ms. Urban's statement when viewed together would be considered "material." In this case the question would be whether there is a reasonable probability that the Magistrate's determination that probable cause existed would have been different if the evidence in question would have been disclosed. Because of the weight that would be given to Elizabeth's eyewitness statement, it is

doubtful those claims would have negated a finding of probable cause.

In sum, Detective Pokely was entitled to rely on Elizabeth's statements to establish probable cause since there is no evidence that Elizabeth's statements were inconsistent, unreliable, or untruthful. Further, after establishing probable cause, Detective Pokely was under no duty to continue an investigation into whether there was any exculpatory evidence supporting the Plaintiff. Lastly, there was no exclusion of "material" exculpatory evidence. Therefore, the Court concludes that probable cause was established to obtain an arrest warrant. Plaintiff's Fourth Amendment claim of unlawful arrest, therefore, is without merit.

3. PLAINTIFF HAS FAILED TO SHOW DETECTIVE POKELY VIOLATED ONE OF HIS FUNDAMENTAL RIGHTS, AND NO EVIDENCE OF A DEFICIENCY IN THE PROCEDURAL PROCESS HAS BEEN SHOWN.

Two elements are necessary to state a cause of action under 42 U.S.C. § 1983. The plaintiff must plead and prove (1) that some person has deprived him of a federal right, and (2) that the person has done so under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). Plaintiff in this case alleges four separate deprivations of a federal right. (1) unlawful seizure; (2) violation of procedural due process; (3) equal protection; and (4) conspiracy.

(a) Plaintiff's Unlawful Seizure Claim Fails Since Probable Cause was Established.

Defendants assert that Plaintiff has failed to state an unlawful seizure 42 U.S.C. § 1983 claim. Defendants' main argument in this section is that there was never an actual seizure because Plaintiff voluntarily turned himself into the police after his lawyer informed him that a warrant for his arrest had been issued.

Under Michigan law, "[a]n arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, *or by any act which indicates an intention to take him into custody* and subjects the person arrested to the actual control and will of the person making the arrest." *People v. Woods*, 16 Mich. App. 718, 720, 168 N.W.2d 617, 618 (1969) (emphasis added). Under the Fourth Amendment, to determine whether there was an arrest, it must be determined whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Saari*, 272 F.3d 804, 808 (6th Cir. 2001) (quoting *United States v. Mendenhall*, 446 U.S. 544 (1980)). Further, in *Albright v. Oliver*, 510 U.S. 266, 271 (1994), the Supreme Court held, in dicta, that a civil rights claimant's surrender to state authority, in the form of an arrest warrant, constituted a "seizure" for purposes of the Fourth Amendment.

Defendants rely on *Skousen v. Brighton High School*, 305 F.3d 520 (6th Cir. 2002), for the argument that the Detective Pokely did not seize or arrest Plaintiff. In *Skousen*, the plaintiff sued Trooper Rambo for unlawful seizure. *Id.* at 523. In that case,

the plaintiff had been charged with aggravated domestic violence. *Id.* at 525. Rambo was the investigating officer, he compiled his investigative findings into a report and submitted it to the prosecutor's office. *Id.* The prosecutor's office charged the plaintiff with assault. *Id.* Upon learning of the charge, the plaintiff voluntarily went to her arraignment. *Id.* After the arraignment, she went to the police station and was processed and fingerprinted. *Id.* In that case, the court found that Rambo did not effectuate the arrest of the plaintiff, and that the plaintiff was never arrested at all because she voluntarily came to the police station. *Id.* at 529–30.

The present case is distinguishable from *Skousen*. A fact missing from that case was an arrest warrant. In our case, Detective Pokely submitted her narrative report to the Prosecutor's office who charged Plaintiff with sexual misconduct. However, an arrest warrant was also obtained, and Detective Pokely testified at the hearing to request the warrant. Though Plaintiff "voluntarily" went to the police station after learning there was a warrant for his arrest, he was submitting to an act which indicated an intention to take him into custody, in the form of the arrest warrant, by the state. Further, the Supreme Court has held in dicta that a submission to an arrest warrant is a "seizure" for the purposes of the Fourth Amendment. *Albright*, 510 U.S. at 271.

However, as discussed above, Officer Pokely had probable cause to arrest Plaintiff. If an officer had probable cause to make the arrest, there can be no claim for an unlawful seizure. Therefore, Defendants will be granted summary judgment on this issue because there was probable cause to make the arrest.

(b) Plaintiff's Procedural Due Process Claim is Without Merit

Plaintiff also contends that his procedural due process rights have been violated. Plaintiff's claim in this regard centers around both his criminal prosecution and the termination of his visitation rights. Assuming *arguendo* that Plaintiff has demonstrated a protected right, he still must show that the process afforded by the State, before the deprivation, was constitutionally deficient. *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Supreme Court established guidelines for determining the sufficiency of the process: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used; 3) the probable value, if any, of additional or substitute procedural safeguards; and 4) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.* at 334–35. The Court also stated, "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 333. *See also Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005) ("Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest.")

Before Plaintiff's visitation rights were temporarily suspended, there was a hearing on October 24, 2003, and another hearing was held before his visitation rights were indefinitely suspended where Plaintiff's attorney cross-examined all the witnesses. These

hearings provided Plaintiff with an opportunity to be heard in a meaningful way. Further, before Plaintiff was arrested, the Prosecutor's office obtained an arrest warrant from the Magistrate, and Plaintiff was afforded an opportunity at the preliminary exam hearing to present evidence in his favor. Plaintiff was given ample opportunities to be heard before any action was taken against him. Therefore, Plaintiff's procedural due process rights were not infringed.

(c) Summary Judgment Will Also Be Granted in Favor of the Defendants on Plaintiff's Equal Protection Claim.

To establish an equal protection claim, a plaintiff must show that the state has made a distinction which has either: (1) burdened a fundamental right, (2) targeted a suspect class, or (3) intentionally treated one differently from others similarly situated without any rational basis for the difference. *Radvansky v. Olmsted Falls*, *supra*, 395 F.3d at 312 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). Plaintiff has not alleged that he was a member of a targeted class or that he was treated differently from others similarly situated without any rational basis. Rather, he claims that Detective Pokely burdened his fundamental right to parenting, and his right to be free from unlawful seizures. [Amend. Comp. at ¶ 153] As addressed above, there was probable cause for the arrest, therefore, the claim of unlawful seizure will not succeed. The only question then is whether Detective Pokely burdened Plaintiff's fundamental right to parenting.

It has been established that the Constitution recognizes a substantive fundamental right to raise

one's child. *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000). Even though the process afforded by a government to an individual before his right is infringed upon may be constitutionally sufficient, a government may not burden a fundamental right "unless the action is necessary and animated by a compelling purpose." *Id.* at 557–58. Although a parent has a fundamental right to raise his child, the state "has a concomitant interest in the welfare and health of children in its jurisdiction, and in certain narrowly-defined circumstances, the State's interest in a child's well-being may supersede that of a parent." *Id.* at 558. Where the state believes a child has been subjected to sexual abuse, a state's interest in a child's well-being may supersede the right of a parent. *Id.* (holding that State of Michigan did not violate mother's fundamental right in raising her child when it terminated her parenting rights where it was found that the child was subjected to child abuse).

On October 24, 2003, Referee Michael Hand suspended Plaintiff's visitation rights with his children. Plaintiff contends that this violated his fundamental parenting rights. The question in this case is whether the government had a compelling interest to suspend Plaintiff's parenting rights. If Plaintiff's visitation rights had not been suspended, his access to Elizabeth would have continued. At the time Referee Hand determined to terminate the Plaintiff's parenting rights, there was probable cause that Plaintiff had sexually abused his daughter Elizabeth. Given that there was probable cause of sexual abuse, Defendants did not violate Plaintiff's fundamental right to raise his children.

4. PLAINTIFF'S CONSPIRACY CLAIM FAILS SINCE THERE IS NO EVIDENCE THAT DEFENDANT POKELY ACTED WITH SOME RACIAL OR OTHERWISE CLASS-BASED ANIMUS.

Plaintiff also asserts a federal conspiracy claim against the Municipal Defendants. This claim is fully discussed in Section B(2)(b) of this Opinion. As discussed above, Plaintiff's failure to present any evidence suggesting that Defendants were motivated by any racial or class based animus mandates dismissal of this claim.

5. DETECTIVE POKELY IS CLOAKED WITH QUALIFIED IMMUNITY

Qualified immunity shields public officials who perform discretionary functions from the necessity of defending against tort liability so long as their conduct does not violate clearly established rights of which a reasonable official would have known. *See Fisher v. Harden*, 398 F.3d 837, 842 (6th Cir.), *cert. denied*, 546 U.S. 1075 (2005). The doctrine is designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow v. Fitzgerald*, 452 U.S. 800, 818 (1982). It is well established that qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Qualified immunity is an affirmative defense, and once asserted shifts the burden of proof to the plaintiff to show that the defendant is not entitled to qualified immunity. *Armstrong v. City of Melvindale*, 432 F.3d 695, 699 (6th Cir. 2006).

Whether qualified immunity applies turns on the "objective legal reasonableness" of the official's action, viewed on a fact-specific, case-by-case basis. *Id.* The Sixth Circuit employs a two-part analysis when determining qualified immunity: "(1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and (2) whether that right was clearly established." *Estate of Carter v. City of Detroit*, 408 F.3d 305, 310-11 (6th Cir. 2005) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).[14] "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Further, "[w]hether a constitutional violation occurred is a threshold issue: if [Detective Pokely's] conduct violated no constitutionally protected right, there is no need for further analysis." *Armstrong*, 432 F.3d at 699.

As discussed in the above sections, even when viewing the facts in the light most favorable Plaintiff, Detective Pokely did not violate any of Plaintiff's constitutional rights; therefore, no further inquiry is

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[14] In some Sixth Circuit cases, a three-step qualified immunity analysis has been employed. *See Taft v. Toms*, 338 F.3d 519, 524 (6th Cir. 2003) (adding step requiring plaintiff to allege sufficient facts to show the official acted "objectively unreasonable in light of the clearly established right"). However, in cases subsequent to *Saucier*, the Supreme Court has not formally broken up the two steps into three. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004). Since the two-step approach comports with the Court's most recent qualified immunity cases, it is the approach that will be applied here.

needed beyond this point.[15] Detective Pokely is shielded by qualified immunity.

6. THERE IS NO FACTUAL BASIS FOR PLAINTIFF'S CLAIM OF *MONELL* LIABILITY AGAINST THE CITY OF TROY

In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that municipalities and local governments are persons suable under 42 U.S.C. §1983. However, the Court also concluded that a local government may only be sued under §1983 when the execution of a government's policy or custom, for which the government as an entity is responsible, inflicts the injury. *Id.* The Sixth Circuit has held that for a government entity to be held liable under §1983, the entity's policy or custom must be the moving force behind the deprivation. *S.H.A.R.K. v. Metro Parks*, 499 F.3d 553, 563 (6th Cir. 2007).

As indicated, under §1983, Plaintiff must plead and prove (1) that some person has deprived him of a federal right, and (2) that the person has done so under color of state law. *Adickes v S.H. Kress & Co.*, *supra*. As set forth above, the Court has concluded

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[15] Even if a constitutional right was found to be violated in this case, it likely would fail the second step in the test. In *Armstrong*, 432 F.3d at 699, the court stated, "In the context of an unconstitutional warrant, an official 'will not be immune if . . . it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.'" *Armstrong*, 432 F.3d at 699 (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). This standard is met here.

that Mr. Molnar's federal rights were not violated. Thus, the City of Troy may not be found liable under §1983 where no constitutional violation has been shown. However, even assuming *arguendo* that Plaintiff may still pursue his *Monell* claim against the City, there is no factual support for any such claim.

Wrongful conduct by a single city officer who has no policy-making authority does not by itself establish municipal policy or custom, for purposes of determining municipal liability pursuant to *Monell*. *Radvansky v. City of Olmsted Falls*, *supra* 395 F.3d at 311. A governmental entity can be held liable under § 1983 only if a plaintiff establishes an unconstitutional action that implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). To demonstrate that the City of Troy is liable under *Monell*, the Plaintiff must: (1) identify the municipal policy or custom; (2) connect the policy to the municipality; and (3) show that his particular injury was incurred due to execution of that policy. *Alkire v. Irving*, 330 F.3d 802, 814–15 (6th Cir. 2003).

Plaintiff claims that policy in question is that the City of Troy fails to train its officers in investigating claims of child sexual abuse. [Complaint ¶¶231–34]. Plaintiff must show that his injury resulted from an execution of that policy. However, Plaintiff has failed to provide any evidence that the City of Troy, as a matter of policy or custom, failed to provide training for Detective Pokely with regard to investigating claims of child sexual abuse. In fact, Detective Pokely states in her affidavit that the City of Troy provided

her "with extensive training in investigation of child sexual abuse cases," and that the City of Troy provides her with ongoing training. [Defendants' Exhibit 1 at 2, ¶¶10–12]. Since Plaintiff's allegation is that Detective Pokely caused his alleged injury and there is evidence that Detective Pokely did have training investigating claims of child sexual abuse, Plaintiff cannot show that his particular injury resulted from the identified policy in question. Summary judgment, therefore, will be found in favor of the City of Troy on this issue.

D. PLAINTIFF HAS NOT ESTABLISHED A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Plaintiff's final claim against the Care House and Municipal Defendants is a claim of intentional infliction of emotional distress.

The Michigan Supreme Court has never adopted the tort of intentional infliction of emotional distress into Michigan jurisprudence. *See Smith v. Calvary Christian Church*, 462 Mich. 679, 686 n. 7, 614 N.W.2d 590, 593 n. 7 (2000); *Roberts v. Auto Owners Ins. Co.*, 422 Mich. 594, 602, 374 N.W.2d 905, 907 (1985); *Khalifa v. Henry Ford Hospital*, 156 Mich. App. 485, 499, 401 N.W.2d 884, 890 (1987); *Andrews v. Prudential Securities, Inc.*, 160 F.3d 304, 309 (6th Cir.1998). However, the Michigan Court has described the standards that would have to be met for satisfaction of such a claim:

> The cases thus far decided have found liability only where the defendant's conduct had been extreme and outrageous. It has not been enough that the defendant acted with an intent

> which is tortious or even criminal, or that he had intended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Roberts v. Auto Owners, supra, 422 Mich. at 602-603, *quoting* Restatement 2d of Torts, § 46, comment d.

Applying the standards enunciated by the *Roberts* court, Plaintiff's claim for intentional infliction of emotional distress in this case fails. The actions of the Care House and Municipal Defendants do not amount to conduct has been "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, to be regarded as atrocious, and utterly intolerable in a civilized community." Accordingly, this claim will be dismissed.

CONCLUSION

For all of the foregoing reasons and for the further reasons stated by the Court on the record on August 28, 2008,

IT IS HEREBY ORDERED Defendants Motions for Summary Judgment [Dkt. Nos. 10 and 37] are GRANTED. Defendants' Motion for Sanctions [Dkt. No. 22] is DENIED.

IT IS FURTHER ORDERED that the Care House Defendants' Motion to Extend Scheduling Order Deadlines or for Stay [Dkt. No. 42] is DENIED as MOOT.

The Court having dismissed, by this Opinion and Order, all claims in this action over which it has original jurisdiction, pursuant to 18 U.S.C. § 1367(c), the Court declines to exercise supplemental jurisdiction over Plaintiff's state law defamation and false light claims against his ex-wife, Defendant Renee Molnar. Accordingly,

IT IS FURTHER ORDERED that Plaintiff's state law defamation and false light claims in Counts Four

and Six of his Amended Complaint are DISMISSED, WITHOUT PREJUDICE.

s/Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: September 4, 2008

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 4, 2008, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry
Case Manager

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 06-CV-15202-DT
Hon. Gerald E. Rosen

[Filed September 4, 2008]

GERALD MOLNAR,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CARE HOUSE (Child Abuse and Neglect Council of Oakland County), AMY ALLEN, JANICE POKELY, CITY OF TROY, and RENEE MOLNAR,	)
	)
Defendants.	)
	)

JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on September 4, 2008

PRESENT: Honorable Gerald E. Rosen
United States District Judge

The Court having this date entered an Opinion and Order granting the Motions to Dismiss and for Summary Judgment filed by Defendants Care House, Amy Allen, Janice Pokely and the City of Troy,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of Plaintiff's claims in this action, except his state law claims against Defendant Renee Molnar, are DISMISSED, WITH PREJUDICE.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's state law defamation and false light claims against Defendant Renee Molnar are DISMISSED, WITHOUT PREJUDICE.

s/Gerald E. Rosen
United States District Judge

Dated: September 4, 2008

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 4, 2008, by electronic and/or ordinary mail.

s/LaShawn R. Saulsberry
Case Manager

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2189

[Filed March 17, 2010]

GERALD MOLNAR,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CARE HOUSE, CHILD ABUSE AND NEGLECT COUNCIL OF OAKLAND COUNTY, ET AL.,	)
	)
Defendants-Appellees.	)

ORDER

BEFORE: SILER, GILMAN, AND ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX E

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV

Section 1.
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more

persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

MCLA § 722.628. Investigations

Sec. 8. (1) Within 24 hours after receiving a report made under this act, the department shall refer the report to the prosecuting attorney and the local law enforcement agency if the report meets the requirements of subsection (3)(a), (b), or (c) or section 3(6) or (9)[1] or shall commence an investigation of the child suspected of being abused or neglected. Within 24 hours after receiving a report whether from the reporting person or from the department under subsection (3)(a), (b), or (c) or section 3(6) or (9), the local law enforcement agency shall refer the report to the department if the report meets the requirements

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[1] M.C.L.A. § 722.623.

of section 3(7) or shall commence an investigation of the child suspected of being abused or neglected or exposed to or who has had contact with methamphetamine production. If the child suspected of being abused or exposed to or who has had contact with methamphetamine production is not in the physical custody of the parent or legal guardian and informing the parent or legal guardian would not endanger the child's health or welfare, the agency or the department shall inform the child's parent or legal guardian of the investigation as soon as the agency or the department discovers the identity of the child's parent or legal guardian.

(2) In the course of its investigation, the department shall determine if the child is abused or neglected. The department shall cooperate with law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in relation to preventing, identifying, and treating child abuse and neglect; shall provide, enlist, and coordinate the necessary services, directly or through the purchase of services from other agencies and professions; and shall take necessary action to prevent further abuses, to safeguard and enhance the child's welfare, and to preserve family life where possible. In the course of an investigation, at the time that a department investigator contacts an individual about whom a report has been made under this act or contacts an individual responsible for the health or welfare of a child about whom a report has been made under this act, the department investigator shall advise that individual of the department investigator's name, whom the department investigator represents, and the specific complaints or allegations made against the individual. The department shall ensure

that its policies, procedures, and administrative rules ensure compliance with the provisions of this act.

(3) In conducting its investigation, the department shall seek the assistance of and cooperate with law enforcement officials within 24 hours after becoming aware that 1 or more of the following conditions exist:

(a) Abuse or neglect is the suspected cause of a child's death.

(b) The child is the victim of suspected sexual abuse or sexual exploitation.

(c) Abuse or neglect resulting in severe physical injury to the child. For purposes of this subdivision and section 17,[2] "severe physical injury" means an injury to the child that requires medical treatment or hospitalization and that seriously impairs the child's health or physical well-being.

(d) Law enforcement intervention is necessary for the protection of the child, a department employee, or another person involved in the investigation.

(e) The alleged perpetrator of the child's injury is not a person responsible for the child's health or welfare.

(f) The child has been exposed to or had contact with methamphetamine production.

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[2] M.C.L.A. § 722.637.

(4) Law enforcement officials shall cooperate with the department in conducting investigations under subsections (1) and (3) and shall comply with sections 5 and 7.[3] The department and law enforcement officials shall conduct investigations in compliance with the protocols adopted and implemented as required by subsection (6).

(5) Involvement of law enforcement officials under this section does not relieve or prevent the department from proceeding with its investigation or treatment if there is reasonable cause to suspect that the child abuse or neglect was committed by a person responsible for the child's health or welfare.

(6) In each county, the prosecuting attorney and the department shall develop and establish procedures for involving law enforcement officials as provided in this section. In each county, the prosecuting attorney and the department shall adopt and implement standard child abuse and neglect investigation and interview protocols using as a model the protocols developed by the governor's task force on children's justice as published in FIA Publication 794 (revised 8-98) and FIA Publication 779 (8-98), or an updated version of those publications.

(7) If there is reasonable cause to suspect that a child in the care of or under the control of a public or private agency, institution, or facility is an abused or neglected child, the agency, institution, or facility shall be investigated by an agency administratively independent of the agency, institution, or facility being

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[3] M.C.L.A. §§ 722.625 and 722.627.

investigated. If the investigation produces evidence of a violation of section 145c or sections 520b to 520g of the Michigan penal code, 1931 PA 328, MCL 750.145c and 750.520b to 750.520g, the investigating agency shall transmit a copy of the results of the investigation to the prosecuting attorney of the county in which the agency, institution, or facility is located.

(8) A school or other institution shall cooperate with the department during an investigation of a report of child abuse or neglect. Cooperation includes allowing access to the child without parental consent if access is determined by the department to be necessary to complete the investigation or to prevent abuse or neglect of the child. The department shall notify the person responsible for the child's health or welfare about the department's contact with the child at the time or as soon afterward as the person can be reached. The department may delay the notice if the notice would compromise the safety of the child or child's siblings or the integrity of the investigation, but only for the time 1 of those conditions exists.

(9) If the department has contact with a child in a school, all of the following apply:

(a) Before contact with the child, the department investigator shall review with the designated school staff person the department's responsibilities under this act and the investigation procedure.

(b) After contact with the child, the department investigator shall meet with the designated school staff person and the child about the response the department will take as a result of contact with the

child. The department may also meet with the designated school staff person without the child present and share additional information the investigator determines may be shared subject to the confidentiality provisions of this act.

(c) Lack of cooperation by the school does not relieve or prevent the department from proceeding with its responsibilities under this act.

(10) A child shall not be subjected to a search at a school that requires the child to remove his or her clothing to expose his buttocks or genitalia or her breasts, buttocks, or genitalia unless the department has obtained an order from a court of competent jurisdiction permitting such a search. If the access occurs within a hospital, the investigation shall be conducted so as not to interfere with the medical treatment of the child or other patients.

(11) The department shall enter each report made under this act that is the subject of a field investigation into the CPSI system. The department shall maintain a report entered on the CPSI system as required by this subsection until the child about whom the investigation is made is 18 years old or until 10 years after the investigation is commenced, whichever is later, or, if the case is classified as a central registry case, until the department receives reliable information that the perpetrator of the abuse or neglect is dead. Unless made public as specified information released under section 7d,[4] a report that is maintained on the CPSI system is confidential and

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[4] M.C.L.A. § 722.627d.

is not subject to the disclosure requirements of the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(12) After completing a field investigation and based on its results, the department shall determine in which single category, prescribed by section 8d,[5] to classify the allegation of child abuse or neglect.

(13) Except as provided in subsection (14), upon completion of the investigation by the local law enforcement agency or the department, the law enforcement agency or department may inform the person who made the report as to the disposition of the report.

(14) If the person who made the report is mandated to report under section 3, upon completion of the investigation by the department, the department shall inform the person in writing as to the disposition of the case and shall include in the information at least all of the following:

(a) What determination the department made under subsection (12) and the rationale for that decision.

(b) Whether legal action was commenced and, if so, the nature of that action.

(c) Notification that the information being conveyed is confidential.

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[5] M.C.L.A. § 722.628d.

(15) Information sent under subsection (14) shall not include personally identifying information for a person named in a report or record made under this act.

(16) Unless section 5 of chapter XII of the probate code of 1939, 1939 PA 288, MCL 712.5, requires a physician to report to the department, the surrender of a newborn in compliance with chapter XII of the probate code of 1939, 1939 PA 288, MCL 712.1 to 712.20, is not reasonable cause to suspect child abuse or neglect and is not subject to the section 3 reporting requirement. This subsection does not apply to circumstances that arise on or after the date that chapter XII of the probate code of 1939, 1939 PA 288, MCL 712.1 to 712.20, is repealed. This subsection applies to a newborn whose birth is described in the born alive infant protection act, 2002 PA 687, MCL 333.1071 to 333.1073, and who is considered to be a newborn surrendered under the safe delivery of newborns law as provided in section 3 of chapter XII of the probate code of 1939, 1939 PA 288, MCL 712.3.

(17) All department employees involved in investigating child abuse or child neglect cases shall be trained in the legal duties to protect the state and federal constitutional and statutory rights of children and families from the initial contact of an investigation through the time services are provided.

(18) The department shall determine whether there is an open friend of the court case regarding a child who is suspected of being abused or neglected if a child protective services investigation of child abuse and neglect allegations result in any of the following dispositions:

(a) A finding that a preponderance of evidence indicates that there has been child abuse and neglect.

(b) Emergency removal of the child for child abuse and neglect before the investigation is completed.

(c) The family court takes jurisdiction on a petition and a child is maintained in his or her own home under the supervision of the department.

(d) If 1 or more children residing in the home are removed and 1 or more children remain in the home.

(e) Any other circumstances that the department determines are applicable and related to child safety.

(19) If the department determines that there is an open friend of the court case and the provisions of subsection (18) apply, the department shall notify the office of the friend of the court in the county in which the friend of the court case is open that there is an investigation being conducted under this act regarding that child and shall also report to the local friend of the court office when there is a change in that child's placement.

(20) Child protective services may report to the local friend of the court office any situation in which a parent, more than 3 times within 1 year or on 5 cumulative reports over several years, made unfounded reports to child protective services regarding alleged child abuse or neglect of his or her child.

(21) If the department determines that there is an open friend of the court case, the department shall provide noncustodial parents of a child who is suspected of being abused or neglected with the form developed by the department that has information on how to change a custody or parenting time court order.

Supreme Court, U.S.
FILED
AUG 17 2010
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No. 09-1536
In the

Supreme Court of the United States

GERALD MOLNAR,

Petitioner,

v.

CARE HOUSE (Child Abuse and Neglect Council Of Oakland County, Michigan), AMY ALLEN, JANICE POKELY, CITY OF TROY, RENEE MOLNAR,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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August 17, 2010

COUNTER STATEMENT OF QUESTION PRESENTED

Whether the District Court properly determined that Petitioner's claims are barred under the doctrine of collateral estoppel because he previously litigated the issue of probable cause for arrest at the preliminary examination stage of his State Court Prosecution.

PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties remaining in the case.

CORPORATE DISCLOSURE STATEMENT

A Corporate Disclosure Statement is not required to be filed by the Respondent City of Troy, since Respondent is a political subdivision of the State of Michigan. With respect to Troy Respondent Janice Pokley, a corporate disclosure statement is also unnecessary as she is not filing this response on behalf of a nongovernmental corporation.

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The United States District Court for the Eastern District of Michigan entered a published opinion and order granting summary judgment for Respondents on September 4, 2009. *See Molnar v. Care House et al.* 574 F. Supp. 2d. 772 (2008) The United States 6th Circuit Court of Appeals affirmed the granting of summary judgment in an unpublished opinion on December 29, 2009. *Molnar v. Care House et al.* 359 Fed.Appx. 623 (6th Cir. 2009)

JURISDICTION

Respondents do not dispute Petitioner's jurisdiction statement.

STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment of the Constitution of the United States. This case also involves the Civil Rights Act of 1871, 42 U.S.C. § 1983.

STATEMENT OF THE CASE

After receiving a complaint, Troy Police Detective Janice Pokley investigated Petitioner for inappropriately touching his minor daughter Elizabeth in October 2003. Her investigation included interviewing Elizabeth's mother, attending an interview of Elizabeth at Care House, interviewing Petitioner, and reviewing police reports from other jurisdictions where Petitioner was suspected of inappropriate sexual behavior. (see RE # 10-2, Detective Pokley's Affidavit)[1]

On November 24, 2003, Detective Pokley submitted a narrative report, summarizing her investigation, to the Oakland County Prosecutor. (RE # 10-2, Detective Pokley's Narrative Report,

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[1] RE refers to "record entry" and the documents filed in the District Court.

Attached to Exh 1) On December 4, 2003, the Prosecutor signed a complaint and warrant, charging Petitioner with Criminal Sexual Conduct in the Second Degree ("CSC"). (RE #10-2, Narrative Report attached to Exh 1) Detective Pokley then swore out the warrant before a Magistrate in the Troy District Court. (RE #10-2, Exh 1 Para 38)

On December 5, 2003, Petitioner turned himself into the Troy Police Department, and was arraigned before District Court Judge Drury, who released him on personal bond. (RE # 10 2 Exh 1 Para 39)

On December 23, 2003, Petitioner appeared in the District Court for his preliminary examination. (RE # 10-2 Exh 1 Para 42, RE# 3 Page 24) This examination lasted approximately three hours. (RE # 10-2 Exh 1 Para 42) The prosecution called Elizabeth as its only witness, and the Defense called Renee Molnar, Detective Pokley and Amy Allen as witnesses. (RE # 10-2 Exh 1 Para 42) At the conclusion of the examination, District Court Judge Drury found probable cause for charging petitioner with the crime of CSC.

(RE # 10-3 Preliminary Examination Transcript attached as Exhibit 2, at Page 139, and RE # 10-4 Bind Over Order attached as Exhibit 3.)

Petitioner Gerald Molnar filed his amended complaint on January 30, 2007. The complaint set forth various alleged constitutional claims against the City of Troy, Troy Police Detective Janice Pokley, Care House, Care House Employee Amy Allen, and Petitioner's ex-spouse, Renee Molnar: false arrest and malicious prosecution in violation of the 4th amendment; denial of due process (procedural and substantive) and equal protection rights in violation of the 14th amendment; conspiracy to violate constitutional rights contrary to 42 U.S.C. §1985; and the state law claim of intentional inflection of emotional distress. Petitioner's Amended Complaint. (RE # 3Amended Complaint, Pages 30-33, 39). The complaint also set forth *a Monell* failure to train claim against the City of Troy. (RE #3 Pages 35, 36)

On February 27, 2007 Troy Respondents filed their motion to dismiss, or in the alternative, motion for summary judgment. Care House Respondents filed their motion for summary judgment on October 9, 2007. The District Court entered judgment for all Respondents on September 4, 2008. The District Court provided several grounds for granting judgment for Respondents. However, the District Court primarily relied on the doctrine of collateral estoppel in dismissing Petitioner's cause of action. *Molnar v. Care House, et al*, 574 F. Supp. 2d. 772, 789 (E.D. Mich 2008). The Sixth Circuit Court of Appeals affirmed the grant of judgment, holding that Petitioner's claims were barred under the doctrine of collateral estoppel. *See Molnar v. Care House et al.* 359 Fed.Appx. 623 (6th Cir. 2009).

REASONS FOR DENYING THE PETITION

I. PETITIONER WAIVED HIS ARGUMENT THAT DETECTIVE POKLEY GAVE FALSE INFORMATION TO THE MAGISTRATE WHO ISSUED THE WARRANT WHEN HE FAILED TO RAISE THIS ARGUMENT IN THE DISTRICT COURT

For the first time on appeal, Petitioner now argues that "Detective Pokley... excluded exculpatory information that was known to her from her report. Consequently, the magistrate who issued the warrant for Molnar's arrest was deliberately kept in the dark about this information."[2] Respondents vehemently deny the allegation. However, in any event, Petitioner is procedurally barred from making this argument in his petition. This argument was not raised in the District Court, nor was it raised in the Court of Appeals, and thus, this argument should be deemed waived. *Pennsylvania Department of Correction v. Yeskey*, 524 U.S. 206, 212; 118 S.Ct. 1952; 141 L.Ed.2d. 215 (1998)

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[2] Petition for Writ of Certiorari at Page 10.

("Where issues are neither raised nor considered by the Court of Appeals, this Court will not ordinarily consider them.")

Furthermore, even if the Courts were to give Petitioner the benefit of the doubt, and find that the argument was at least tangentially raised in the trial court, Petitioner is still not entitled to his requested relief. Petitioner has not provided any sworn testimony to support this allegation, and he did not provide sufficient detail to describe the alleged false information supplied by Detective Pokley. The Court rules require establishment of disputed facts through a transcript, affidavit or otherwise (sworn testimony). See Fed. R. Civ. P. 56(e), *Celotex Corporation v. Catrett*, 477 U.S. 317,324; 106 S.Ct. 2548; 91 L.Ed.2d 265 (1986) ("Rule 56(e) therefore requires the non-moving party to go beyond the pleadings, and by her own affidavits...designate 'specific facts showing that there is a genuine issue for trial'.) Therefore, the petition should be denied.

II. THE SIXTH CIRCUIT COURT OF APPEAL'S OPINION IS CONSISTENT WITH SUPREME COURT PRECEDENT AND WELL ESTABLISHED LAW

To support his petition for writ of certiorari, Petitioner asserts that the there is a conflict between the Sixth Circuit Court of Appeals and this Court. Petitioner then argues that the Sixth Circuit Court of Appeals decision is inconsistent with this Court's decision in *Allen v. McCurry*, 449 U.S. 90; 101 S. Ct. 411; 66 L.Ed. 2d 300 (1980). Although Petitioner cites the *Allen* case, he never explains the alleged conflict. His petition is lacking in this regard for good reason -- the panel's decision is consistent with this Court's case.

In *Allen*, Respondent was charged with a drug and an assault crime in state court. *Id.* at 91. He brought a motion to suppress the drugs seized from his home, which the trial court denied in part. *Id.* After his criminal trial, where Respondent was found guilty of both criminal offenses, Respondent

brought a 42 U.S.C. §1983 action, alleging that the arresting police officers violated his fourth and fourteenth amendment rights when they searched his home and seized the drugs. *Id.* The District Court granted summary judgment to the officers, holding that Respondent's claim was barred by collateral estoppel. *Id.* at 93. The Court of Appeals reversed and invoked "the special role of the federal courts in protecting civil rights." *Id.* The Court of Appeals concluded that that the § 1983 suit was McCurry's only route to a federal forum for his constitutional claim. *Id.*

This Court reversed, holding that collateral estoppel could be dispositive in 42 U.S.C. §1983 actions. *Id.* at 101. Citing to the full faith and credit statute, 28 U.S.C. § 1738, as well as the legislative history of 42 U.S.C. §1983, the Court held that issues actually litigated in state court proceedings are entitled to the same preclusive effect in a federal §1983 suit as they enjoy in the state courts where the judgment was rendered. *Id.* at 98-100.

This Court's holding in *Allen* has been reaffirmed and applied in subsequent Supreme Court decisions. For example in *Haring v. Prosise,* 462 U.S. 306; 103 S. Ct. 2368; 76 L.Ed.2d 595 (1983) this Court considered whether collateral estoppel would apply to Respondent's federal civil rights claim when he pled guilty in his Virginia criminal proceeding. On April 27, 1978 Respondent John Prosise pleaded guilty in a Virginia Circuit court of manufacturing phencyclidine *Id.* at 308 At his plea hearing, the prosecution called Detective Henry Allen who testified that he responded to Prosise's apartment, and when he arrived, two officers had arrested Prosise for possessing a controlled substance. *Id.* Detective Allen then entered Respondent's apartment where he noticed a quantity of phencyclidine. *Id.* Detective Allen obtained a search warrant, searched Prosise's apartment and then seized devices and chemical used to manufacture phencyclidine. *Id.* After taking Detective Allen's testimony, the Circuit Court judge accepted Prosise's plea and sentenced him to 25 years imprisonment. *Id.* at 309.

Prosise then filed a § 1983 action against Petitioner and members of the Arlington County Police Department alleging that the police unlawfully searched his apartment prior to obtaining the search warrant. *Id.* The District Court granted summary judgment to defendants, holding that Prosise's guilty plea precluded him from bringing his civil rights claim. *Id.* The Court of Appeals reversed and remanded for further proceedings. *Id.* at 310. This Court affirmed the decision of the Court of Appeals. In so doing, this Court relied first on the *Allen* decision. The Court first recognized that in *Allen*, the Court concluded that that the doctrine of collateral estoppel can apply to § 1983 suits against police officers to recover for Fourth Amendment violations. *Id.* at 313. The Court, again citing *Allen*, then turned to 28 U.S.C. § 1738, which requires "federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so." *Id.* However, collateral estoppel will not apply where

"the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Id.* citing *Allen* at 101 S.Ct. at 418. The *Haring* Court also recognized that collateral estoppel would not apply when the state court were unable or unwilling to protect federal rights. *Id.* citing *Allen* at 101 S.Ct. at 4.

The *Haring* Court then reviewed Virginia Courts' application of collateral estoppel *Id.* at 314. The Courts of Virginia held that "Unless an issue was actually litigated and determined in the former judicial proceeding, Virginia law will not treat it as final." *Id.* at 315. (internal citations omitted). "Furthermore, collateral estoppel precludes the litigation of only those issues necessary to support the judgment entered in the first action." *Id.* Based on Virginia law, this Court concluded that collateral estoppel would not apply for three reasons:

First, the legality of the search of Prosise's apartment was not actually litigated in the criminal proceedings. Indeed, no issue was "actually litigated" in the state proceeding since Prosise declined to contest his guilt in any way. Second, the criminal proceedings did not actually decide against Prosise any issue on which he must prevail in order to establish his § 1983 claim. The only question raised by the criminal indictment and determined by Prosise's guilty plea in Arlington Circuit Court was whether Prosise unlawfully engaged in the manufacture of a controlled substance. This question is simply irrelevant to the legality of the search under the Fourth Amendment or to Prosise's right to compensation from state officials under § 1983.

Finally, none of the issues in the § 1983 action could have been "necessarily" determined in the criminal proceeding. Specifically, a determination that the county police officers engaged in no illegal police conduct would not have been essential to the trial court's acceptance of Prosise's guilty plea. *Id.*

This Court has uniformly held that issues actually litigated in state court proceedings are entitled to the same preclusive effect in a federal 42 U.S.C. §1983 suit as they enjoy in the state courts where the judgment was rendered. *Migra v Warren City School District Board of Education,* 465 U.S. 75; 104 S.Ct. 892; 79 L.Ed. 56 (1984) see also *San Remo Hotel v. City and County of San Francisco,* 545 U.S. 323; 125 S. Ct. 2491; 162 L.Ed.2d 315 (2005), ("We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have federal claims relitigated in federal court.")

Turning to this case, the Sixth Circuit Court of Appeals properly applied Sixth Circuit precedent regarding collateral estoppel, consistent with the rules set forth in *Allen* and its progeny. The law in the Sixth Circuit provides "that where the state affords an opportunity for an accused to contest probable cause at a preliminary examination and the accused does so, a finding of probable cause by the

examining...judge should foreclose re-litigation of that finding in a subsequent § 1983 action" *Smith v. Thornburgh*, 136 F.3d 1070, 1077 (6th Cir. 1997), citing *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987).

Although, the Court of Appeals did not explicitly cite to *Allen* and the other Supreme Court cases cited above, it did cite to *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001). In *Darrah*, the Plaintiff was arrested for obstructing Troy Police Officer Russell Bragg. *Id.* at 304. A preliminary examination on the criminal charge was held, where the state court determined there was probable cause to bind Plaintiff over for trial. *Id.* at 305. Ms. Darrah's case proceeded to trial, where she was acquitted. Id. Plaintiff then filed a civil rights complaint, asserting a claim of malicious prosecution. *Id.* Her malicious prosecution claim was based on the assertion that the Defendant Officer Bragg "made material false statements to the state judge that formed the basis of that court's probable cause determination." *Id.* at

311. The *Darrah* Court, citing to this Court's decision in *Haring* and then, applying Michigan collateral estoppels rules, as instructed in *Allen* and *Haring*, held that collateral estoppel would not apply because Plaintiff was not challenging the lack of probable cause, but the Officer's false testimony at the preliminary examination, and therefore, the issues were not identical. *Id.*

As distinguished from *Darrah*, collateral estoppel does apply to Petitioner's Fourth Amendment claim. Petitioner alleged in his complaint that Detective Pokley "lacked probable cause to request a warrant." (RE # 3 Page 28) He also admitted that "[o]n or about December 23, 2003 a...preliminary examination was held."(RE # 3 Page 24) Further, it is undisputed that this examination consisted of testimony from Elizabeth Molnar, Renee Molnar, Amy Allen, and Detective Pokley. (RE # 10 Exh 1 Para 42) Elizabeth Molnar was the sole witness for the prosecution, while Petitioner called Detective Pokley, Amy Allen and Renee Molnar as defense witnesses.

(RE # 10-2 Exh 1 Para 42) At the completion of the examination, which lasted approximately three hours, 52-4 District Court Judge Dennis Drury found probable cause for charging Petitioner with the crime of CSC. (RE# 10-3 Exh 2, Preliminary Examination Transcript and RE # 10-4 Exh 3, Bind Over Order) Because probable cause was found at the preliminary examination, Petitioner is barred from re litigating the issue of probable cause, and therefore dismissal of his complaint was appropriate. Therefore, his petition should be denied.

III. PROBABLE CAUSE TO ARREST AND THE INTEGRITY OF JANICE POKLEY'S INVESTIGATION WERE LITIGATED AT THE PRELIMINARY EXAMINATION

Petitioner attempts to create an artificial distinction between probable cause for prosecution and probable cause for arrest in this case. He claims that collateral estoppel should not apply because he is now challenging "the integrity of Detective Pokley's investigation," which he argues is central to the

issue of probable cause for the arrest of Petitioner, as opposed to probable cause for prosecution. He argues that the preliminary examination decided only the issue of probable cause for the prosecution of Petitioner, and therefore there is no preclusive effect. He makes this distinction, since the lower courts' recognized that Officer Pokley's testimony was not critical to the probable cause determination, since the trial court judge relied almost exclusively on the testimony of Elizabeth Molnar, the victim of the crime. Petitioner claims that probable cause to arrest/integrity of the investigation was never litigated at his preliminary examination. Petitioner's argument is meritless. The facts in this case reveal that probable cause to arrest and the integrity of the investigation were litigated at Petitioner's preliminary examination. Therefore, the Court should deny the petition.

In support of his argument, Petitioner cites to two Court of Appeals decisions. First, Petitioner

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[3] Petition for Writ of Certiorari at Page 16

[4] *Id.*

relies on an Eighth Circuit case, *Sanders v. Sears, Roebuck & Company*, 984 F.2d 972 (1993). This case does not support his argument. In *Sanders*, a Sears' security guard detained Plaintiff on suspicion of shoplifting. *Id.* at 973-974 Plaintiff was later charged and prosecuted for theft of property pursuant to a Nebraska statute. *Id.* Plaintiff requested a dismissal of the criminal charges, relying on another Nebraska statue that created a presumption as to when a prima facie shoplifting case was established. *Id.* at 974. The Nebraska trial court denied this motion, finding that this statute was inapplicable, and allowed the case to proceed to trial. *Id.* After Plaintiff was found not guilty, he brought a civil rights action against Sears and the security guard. *Id.* at 973 Both parties moved for summary judgment. The issue was the applicability of collateral estoppel and whether Plaintiff was barred from bringing the civil rights action because he lost his motion to dismiss in the trial court. *Id.* The Court found that there was no hearing adjudicating the lawfulness of the arrest by the Sears' guard. *Id.* at 975

Unlike *Sanders*, there were not two different stages in this case. In *Sanders*, there was an immediate arrest and then a subsequent prosecution after further investigation, Petitioner's arrest was a result of the criminal prosecution, and was not separate and distinct from it. Detective Pokley, unlike the security guard in *Sanders*, did not detain Petitioner and then request a warrant. Instead, Detective Pokley conducted interviews, reviewed other reported criminal activity, and then prepared a narrative report. (see RE # 10-2, Detective Pokley's Affidavit) She then submitted this information to the Oakland County Prosecutor for review. (RE #10-2, Narrative Report attached to Exh 1) The Oakland County Prosecutor charged Petitioner with the crime of CSC. Petitioner turned himself in shortly thereafter and was then released on bond. The probable cause to arrest versus the probable cause for prosecution distinction that is present in *Sanders* simply is not present in this case. Detective Pokley did not detain Petitioner prior to him being prosecuted by the County Prosecutor for CSC.

Petitioner also relies on *Golino v City of New Haven*, 950 F.2d. 864 (2nd Cir. 1991). Like *Sanders*, this case does not aid Petitioner's argument.

In *Golino*, the Court of Appeals concluded that collateral estoppel did not apply because Connecticut's probable cause hearing is procedurally limited:

> We think the district court was correct in its assessment that, for collateral estoppel purposes, the 1984 state hearing entailed procedural limitations that curtailed Golino's efforts to secure the full and fair litigation of the probable cause issue. The purpose of such a hearing is generally the evaluation of the "sufficiency" of the evidence to constitute probable cause, not the "integrity" of the evidence. See, e.g., *Schertz v. Waupaca County*, 875 F.2d 578, 581 (7th Cir.1989); *Bailey v. Andrews*, 811 F.2d at 369-70. Thus, at such a hearing under Connecticut law, the suspect apparently has no right to call any witnesses or to introduce any evidence of his own. Nor did the state court exercise discretion to permit Golino to call witnesses or offer evidence. Rather, he was limited to cross examining the state's witnesses and submitting a written offer of proof identifying witnesses and evidence he wished to present.

> Further, in connection with the preliminary hearing, Golino had no access to the police investigative file. As has transpired in the present action, that file contained numerous items of evidence that could have been used to cross examine the police officers who testified and to create substantial questions about the existence of probable cause to prosecute Golino. *Id.* at 869-870

Contrary to *Golino*, Petitioner had a full opportunity to challenge the integrity of the investigation at his preliminary examination, and he exercised that right by calling Detective Pokley and others in his defense. Additionally, unlike in *Sanders and Golino*, Petitioner was afforded a full and fair probable cause hearing, where he could completely challenge Detective Pokley's investigation by calling witnesses, and presenting evidence. Unlike the hearings in *Sanders* and *Golino*, Petitioner's preliminary examination was extensive, lasting approximately three hours. The prosecution presented Elizabeth Molnar as its sole witness. While Defense Counsel (the same counsel in this civil litigation) called Detective Pokley, Amy Allen and Renee Molnar as defense witness-

es. They were subject to extensive cross examination by Petitioner's Counsel. (RE # 10-2 Exh 1 Para 42)

Furthermore, and contrary to Petitioner's assertions that the state court judge did not rule on the issue of probable cause for arrest, at the completion of the examination 52-4 District Court Judge Dennis Drury found probable cause for charging Plaintiff with the crime of CSC. Petitioner litigated probable cause for his arrest at the preliminary examination.

Petitioner also alludes to the fact 42 U.S.C. Section 1983 provides oversight of the state courts, which is necessary to protect against corruption. He then cites to the period in our history where the prevalence of the KKK resulted in deprivation of constitutional rights. However, unlike the historical precedent cited, Petitioner in this case was provided with a full and fair opportunity to litigate, and he was actually acquitted of the criminal charge. The Sixth Circuit Court, and also the District Court, properly applied collateral estoppel to this 42 U.S.C. Section 1983 case, and dismissal was appropriate.

Petitioner also throws in another argument to support his request for extraordinary relief. He relies on *Dowling v. United States*, 493 U.S. 342, 110 S. Ct. 668 81 L.Ed. 2d 425 (1990) to support his

argument that when since there is a lower standard of proof for a civil 42 U.S.C. Section 1983 case than what is required for a criminal case, collateral estopped does not apply. According to Petitioner, "As this Court reasoned in *Dowling*, if the Government is not estopped from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof, Molnar similarly cannot be estopped in relitigating an issue in a subsequent civil 1983 action."[5] *Dowling* is inapplicable for several reasons. First, *Dowling* is not a civil rights case, but a criminal case where the prosecution submitted F.R.E. 404(b) evidence from a prior federal robbery case, where Defendant was acquitted, for the purpose of proving identification in a subsequent robbery case. *Id.* at 344. Second, *Dowling's* holding that collateral estopped would not apply to the use of other acts evidence was based on the examination of double jeopardy principles — not the full faith and credit statute as examined in *Allen*. *Id.* at 347. Further, the *Dowling* Court rejected the collateral estoppel argument because different burdens of proof; the burden of proof to admit other acts evidence is

[5] Petition for Writ of Certiorari at Page 21.

different or lower than the reasonable doubt standard- the standard in the defendant's first robbery case. *Id.* at 349. In this case, the burden of proof for Plaintiff's civil rights action, and at the preliminary examination of his criminal case is the same – probable cause. In spite of these distinctions, Petitioner now attempts to use this evidentiary ruling to bolster his argument that he should be afforded two opportunities to challenge the ultimate issue of fact, which is that there was probable cause to arrest and prosecute Petitioner for the crime of CSC. This ultimate issue was decided at Petitioner's preliminary examination. Petitioner's argument is not supported by the controlling case law, and should be disregarded. Petitioner was provided with a full opportunity to litigate the issue of probable cause at his preliminary examination.

CONCLUSION

The petition for a writ of certiorari should be denied.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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COUNTER-STATEMENT OF QUESTIONS PRESENTED[1]

* * *

3. Whether a private non-profit organization engaged in the primary function of protecting minor children from abuse is a "state actor" for purposes of 42 U.S.C. § 1983 when the organization's primary function is not "exclusively the prerogative of the state" and where the nature of the function provides countervailing reasons why the organization should not be considered a state actor.

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[1] Respondents, Amy Allen and Care House, hereafter "the Care House Respondents", do not address the first two of Petitioner's questions presented as they do not pertain to the Care House Respondents and/or they have been adequately briefed by learned counsel for the Municipal Defendants.

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SUMMARY OF ARGUMENTS

While the Court of Appeals did not address this issue, The Care House Respondents did benefit from a thorough, well-written district court opinion in which Judge Rosen utilized nearly thirteen pages analyzing the question of whether the Care House Respondents could be considered state actors, and if so, whether they could be held liable under 42 U.S.C. § 1983.

In their brief on appeal, the Care House Respondents explained the Sixth Circuit's analysis of the "state actor" issue under three separate tests enunciated by this Court over the years.[2] This Court has made it clear that private, non-profit organizations are not "state actors" despite the fact that they may receive public funding from the state, be regulated by the state, and perform services for the state where such services are not exclusively the prerogative of the state.[3] This Court has repeatedly addressed this analysis in a variety of circumstances. Moreover, this Court has noted that even if the private entity may be considered a state actor, countervailing reasons may exist which mitigate against

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[2] As noted by the district court, the Sixth Circuit has only recognized three of the tests: (1) the public function test; (2) the state compulsion test; and (3) the nexus or symbiotic relationship case. See *Burton v. Wilmintong Parking Auth.*, 365 U.S. 715, 721-26 (1961).

[3] *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-43 (1982).

imposing liability under 42 U.S.C. § 1983.[4] The Sixth Circuit has followed this Court's precedent and has refused to impose liability under § 1983 against private entities performing a variety of analogous services.

In the instant case, the Care House Respondents were engaged in their primary function of protecting minor children from abuse – any abuse, be it at the hands of a parent, a guardian or a governmental agency or institution. Under each of the tests applied to consider whether a private entity is a state actor, the Care House Respondents were not performing a function exclusively within the prerogative of the state, were not compelled, either overtly or covertly to act in the manner they did, and had no entwined nexus with the state such that their actions could be seen as being fairly attributable to the state. Finally, the important and paramount function of the Care House Respondents is to protect minor children from abuse and this countervailing reason alone is sufficient, even if the Care House Respondents are deemed to be state actors, to refrain from imposing § 1983 liability against them.

Even if this Court were to conclude that the Care House Respondents were state actors in this case, Petitioner still has to demonstrate that their actions were the proximate cause of the injury of which he

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[4] *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 303-04 (2001)

complains. Numerous cases in this circuit as well as others hold that even law enforcement officers who actively investigate and ferret out criminal activity are not liable under § 1983 where the plaintiff has been subsequently prosecuted, whether or not a conviction results. In the instant case, the Care House Respondents presented evidence that they did nothing to encourage, elicit or create testimony, they did not actively participate in the investigation and prosecution, and they were not compelled by the state to do so. Petitioner failed to rebut this evidence.[5] For

[5] Petitioner's briefings included references to documents that are not a part of the lower court (district court) record in this case. The Care House Respondents objected to the motion filed by Petitioner seeking to move the Circuit Court to accept non-record materials or, in the alternative, to take judicial notice of *facts* that were not a part of the record. As stated in its objection, the Care House Respondents do not read Fed. R. App. P. 10(e) as allowing a party to *add to* the record in the Circuit Court documents, materials, or evidence which were not already a part of the district court record. The Circuit Court denied Petitioner's motion, but nonetheless adhered to the view that it had "equitable powers" to supplement the record. See *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003). To the extent that this Court reads the rule as allowing the Circuit Court to create a record which contains items that were not part of the district court record below, the Care House Respondents respectfully disagree with that interpretation as it would seem to allow for unbridled opportunity to re-litigate cases in the Circuit Courts as if they were tribunals of first instance.

these reasons, as further discussed herein, Petitioner's request for review of the Circuit Court's opinion should be denied.

ARGUMENTS

I. The Care House Respondents Were Not State Actors and Therefore No Viable § 1983 Claims Can Be Brought Against Them

To prevail on a § 1983 claim, a plaintiff must show the deprivation of a right protected by the Constitution or laws of the United States that was caused by a person acting under color of state law. *Boykin v. Van Buren Twp.*, 479 F.3d 444, 451 (6th Cir. 2007). The Sixth Circuit continues to apply three separate tests to determine whether a defendant is a state actor. *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003); *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 564 (6th Cir. 2007) (recognizing that this Court's decision in *Brentwood v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295-96 (2001) applied a case-by-case "normative and fact-bound" inquiry). These tests are: (1) the "public function" test; (2) the "state-compulsion test"; and (3) the "nexus" test. *S.H.A.R.K.*, *supra*.

Under the "public function" test, a private entity will be engaged in state action only if the challenged conduct is an exercise of a power that is "traditionally exclusively reserved to the state, such as holding

elections or eminent domain." *S.H.A.R.K.*, *supra*. The "state compulsion" test requires the state to exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state. *Id.* at 565. Under the "nexus" or "symbiotic relationship" test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the private entity such that the actions or conduct of the latter may be fairly treated as that of the state itself. *Id.* As explained in the *S.H.A.R.K.* decision this Court in *Brentwood*, *supra* at 291, found state action based on "pervasive entwinement," between the private actor and the state such that there was no "offsetting reason to see the association's acts in any other way." *Id.* "Entwinement" according to this Court, could exist where a private entity is "entwined with governmental policies", or where the private entity is subject to public management or control. *Brentwood*, *supra* at 295-98. However, even where there is *pervasive entwinement*, this Court noted that a finding of state action "may be outweighed in the name of some value at odds with finding public accountability in the circumstances." *Id.* at 303. The Court used the example of the public defender, whose salary was paid by the state and whose employment would be conclusive of state action in some cases, but not when the lawyer was doing his or her primary job, "then, the public defender does not act on behalf of the state" but is, instead, the state's adversary. *Id.* at 303-04 (internal citations omitted). Applying each

of these above-mentioned approaches reveals that the district court properly concluded that The Care House Respondents were not state actors.

1. No Public Function: The Care House Respondents were Not Engaged In Conduct that is an Exclusively Reserved Prerogative of the State

Matters exclusively within the prerogative of the state, such as the conducting of elections and the exercise of the sovereign's right of eminent domain fulfill the category of activities which, if engaged in by a private entity, may subject that entity to characterization as a "state actor" for purposes of 42 U.S.C. § 1983. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352-53 (1974) (citing examples).

Several courts have held that providing social welfare services to minors is not a "traditionally exclusive governmental function." *Reguli v. Guffee*, Slip Copy, 2009 WL 425020, *4-6 (M.D. Tenn. 2009); *Martinez v. County of Kern*, 2007 WL 1079937, *5-6 (E.D. Cal. 2007) (holding that *placement* recommendations of minor children that had been removed from their original homes was not "state action" as the recommendations and actions of the private organizations were distinguished from *actual removal from custody*, which was a prerogative exclusively within the auspices of the state); *Mabe v. San Bernardino County Dept. of Social Services*, 237 F.3d 1101, 1109, n. 3 (9th Cir. 2001) (foster parents not

state actors); *Rayburn ex. rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (same); *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 168, n. 9 (3rd Cir. 2001) (legal custodian not state actor); *Malachowski v. City of Keene*, 787 F.2d 704, 710-11 (1st Cir. 1986), cert. denied 107 S. Ct. 107 (1986) (a private, non-profit organization that made available foster care for state agencies and provided recommendations to the juvenile courts with respect to child placement was not a state actor because decisions regarding disposition and recommendations regarding placement were not exclusive prerogatives of the state).

In the instant case the Care House Respondents were engaged in their primary function, which was to advocate, prevent, intervene in and treat child abuse and neglect. RE #37, the Care House Respondents' Motion for Summary Judgment, Exhibit 3, p. 2, ¶ 3.[5] Care House's motto is "It shouldn't hurt to be a child" and Care House "provides the community with a multi-disciplinary team approach to the problem of child abuse, as well as a safe environment for the child victim to be heard and ongoing support for abused children and their non-offending family members." *Id.*, pp. 2-3. As noted by the cited cases, social welfare organizations that provide a variety of similar services to the community are not engaged in an activity that is an exclusive prerogative of the

[5] "RE" refers to the numbered record entries submitted in the Circuit Court

state, such as the conducting of elections or the exercise of eminent domain. In the instant case, the district court correctly concluded that the Care House Respondents did not meet the "public function" test to be considered state actors for purposes of § 1983 liability.

2. *No State Compulsion: The Care House Respondents were Not Overtly or Covertly Coerced or Encouraged by the State*

Despite the fact that Petitioner attempts to create a set of factual circumstances to demonstrate that the Care House Respondents were coerced by or encouraged by the state to engage in the conduct complained of, the record presented by the Care House Respondents in their motion for summary judgment demonstrates that there was no overt or covert pressure exerted by the state.

In *Rendell-Baker*, *supra* at 841-42, this Court discussed the "state compulsion" theory as applied to a privately operated high school for maladjusted youths in a § 1983 action filed by the school's former teachers and counselors. The Court pointed out that the school received public funds, was a party to a government contract, accepted students on referral by the government, and yet, it was not a "state actor". *Id.* at 840. The Court noted that the school was analogous to the "public defender" who was determined not to be a state actor in *Polk County v. Dodson*, 454 U.S. 312, 318 (1981), because, although the

state paid the public defender, the relationship with her client was like that of any other lawyer-client relationship. *Id.*

The instant situation is nearly analogous. Although Care House receives funding from the state, takes all of its referrals from state agencies, and is a party to government contracts to provide its services, the primary goal and function, and thus, the duty and loyalty reposed in Care House is to the minor child. The only "compulsion" that exerts influence over Care House is the asserted goal of advocating against, preventing, intervening in and treating child abuse and neglect. As with the public defender's client in *Polk County*, *supra*, the primary beneficiary of Care House's services is the child. That law enforcement officials may become involved where there is suspected criminal conduct involving the child is only an affirmation of Care House's duty to protect the child and its statutory obligations to report such suspected criminal conduct. This "compulsion" however in no way makes Care House a state actor because the reporting of suspected criminal activity is secondary to its primary goal of providing the child with an opportunity to be free of abuse and neglect.

3. No Nexus: The Care House Respondents Were Not Engaged in Conduct or Actions that Could Be Fairly Treated as Actions of the State

The state is charged with the duty of ferreting out criminal activity through the exercise of the law enforcement function and prosecuting such crimes where there is probable cause to believe that they have been committed. Care House's stated goal is advocating against, preventing, intervening in and treating child abuse and neglect.

Amy Allen stated that neither she nor anyone else from Care House "was involved in the investigation which took place after the interview." RE #37, The Care House Respondents' Motion for Summary Judgment Exhibit 3, ¶ 12. She stated that she "did not provide counseling, treatment or have any further contacts with Elizabeth Molnar (Petitioner's daughter), other than incidental contact when seeing her in court while waiting for court hearings." *Id.* Amy Allen further stated that she "did not participate in the decision making process engaged in by the Oakland County Prosecutor's office with respect to filing and/or pursuing criminal charges against [Petitioner]." *Id.*, ¶ 13. In her affidavit, Amy Allen states that she "did not investigate the basis for, nor seek, nor institute, nor maintain any criminal charges" against Petitioner. *Id.*, pp. 4-5, ¶ 15. She also states that she "did not encourage or participate in the investigation by the Troy Police nor in the investigation, actions

and decisions made by the Oakland County Prosecutor." *Id.*, p. 5, ¶ 16.

State action may be found only if there is such a "close nexus between the state and the challenged action" that seemingly private behavior "may be fairly treated as that of the state itself." *Jackson*, *supra* at 351. The Supreme Court has refined this test to include the concept of "entwinement". *Brentwood*, *supra* at 288-89. Under this test, attribution of state action may occur where the private entity "is entwined with governmental policies or when government is entwined in [the private entity's] management or control." *Id.* However, the Court continues to recognize the "public function" test's requirement that a private entity that exercises a function that is exclusively within the prerogative of the state would be considered a state actor. Thus, the mere fact that a private entity may forward general governmental policies in parity with other governmental agencies, as in this case, the detection, prevention and treatment of child abuse and neglect, in no way reaches a level of "entwinement" that could be attributed to purely or exclusively state action. Indeed, Care House's goal is to protect the child, regardless of whether that protection may be for *or against* the state in a given case. Moreover, there is no evidence that the government exercises direction, management or control over Care House.

The district court examined the factual materials presented and found that there was no nexus between the exercise of the state's assertive power to

ferret out criminal activity and the services performed by Care House. RE #52, p. 18, citing *People v. Wilhelm*, 822 N.Y.S.2d 786 (2006); *People v. Greene*, 760 N.Y.S.2d 769 (2003). Additionally, the district court analyzed whether there was management or control over Care House consistent with the "entwinement" analysis presented in *Brentwood*, *supra*. RE #52, pp. 17-18. The district court correctly concluded that the Care House Respondents did not meet the definition of "state actor" under the nexus test.

4. Countervailing Concerns Mitigate Against Finding "State Action"

Even if "entwinement" were to be applied here, and the Care House Respondents could be said to have been engaged in "state action", countervailing concerns mitigate in favor of preserving, indeed, insulating the Care House Respondents from the liabilities imposed by § 1983. See *Brentwood*, *supra* at 303 ("[e]ven facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances"). As much as it is the obligation of law enforcement officials, prosecutors, and the state to investigate and prosecute suspected criminal activity, here, the primary obligation of the Care House Respondents is to protect minor children. The *recipient* of its services, those with respect to whom it performs its primary activity, is neither the state or the child's parent or foster parents. It is the child who benefits from Care

House's obligation to discover and reveal whether it might be more beneficial, in order to protect the child's interests, that the child remain with their current guardian where the interview's results reveals no abuse or neglect. Hence, the motto: "It shouldn't hurt to be a child."

As Justice Souter aptly noted in the *Brentwood* case, even a public defender, whose salary is paid by the state and who is definitely a state employee whose actions and conduct would be conclusive of state action in some circumstances, is ordinarily in a position that is adverse to the state, performing his or her primary job of defending a client being prosecuted by the state. *Brentwood, supra* at 303-04. Indeed, as it is Care House's stated role to be engaged "solely [in] the advocacy, prevention, intervention and treatment of child abuse and neglect", see RE #52 District Court Opinion, p. 4; RE #37, The Care House Respondents' Motion for Summary Judgment, p. 11 and Exhibit 3, Amy Allen's Affidavit, they are as likely to be so engaged *against* a state actor who might be engaged in abuse of a child as against a parent or foster parent accused of abuse on behalf of the recipient of their services. Admittedly, as the Care House Respondents confirm, more often than not it is a family member or private custodian that engages in abuse, but this fact does not absolve them of their obligation to perform their function where similar concerns might exist where the child is in the custody of a state agency or institution. Law enforcement officers, prosecutors and judges have as much of an

obligation to investigate, prosecute and convict in the latter case as much as in the former. Thus, preserving the independent role of such entities as Care House for the benefit of the minor child outweighs the concerns of the suspected offending individual, even where, in some circumstances, the entity might be otherwise sufficiently entwined with the state to make it a state actor. *Brentwood*, *supra* at 303-04.

If no neglect or abuse is revealed or discovered, despite allegations and accusations by state actors or others acting in concert, then the private entity will have performed its function and no further action will be taken – which is to say that the child will be deemed to have been protected. In this case, specifically, were it to be determined that The Care House Respondents are state actors for purposes of § 1983, then their stated objective would be frustrated as much by pressures and coercion from the state as from the parents or individuals from whom the minor children must be protected. Of course, the former is precisely what is alleged in the instant case, i.e., that the Care House Respondents conspired with the other government defendants to deprive Petitioner of his right to parent. However, the application of this allegation in one instance by no means creates a reason to ignore the countervailing reasons stated to liberate private organizations and their employees from the threat of being state actors whenever they attempt to perform their primary function. In short, to conclude that they are subject to § 1983 as state actors in such circumstances (which is revealing and

discovering facts in order to protect children) would be nothing short of rendering the function impotent to the benefit of either the abusive custodian or the state's decision, and, in either case, to the child's detriment.

As established, the Care House Respondents took no active or intentional part in going forward with a criminal prosecution. RE #37, The Care House Respondents' Motion for Summary Judgment Exhibit 3, pp. 2-5. Their goal was to protect the minor child by revealing and discovering facts which establish that the *current custodial environment* of the child, whether it be with one or another parent, a foster parent, a relative, or even a state agency, is a threat to the health, safety, and welfare *of the child*. If such facts are revealed or established by Care House then it will have performed its primary function and the subsequent course of action is undertaken by others. This is a countervailing reason sufficient to withhold application of § 1983 despite a finding of entwinement. *Brentwood*, *supra* at 303-04.

5. Analogous Case Law

With respect to non-profit organizations that provide social welfare services to minor children, other courts have come to similar conclusions as did the district court in this instance. Thus, in *Reguli v. Guffee*, Slip Copy, 2009 WL 425020, *4-6 (M.D. Tenn. 2009), the district court ruled that the counselor of a non-profit organization did not have a sufficiently close nexus to the state to be fairly treated as having

performed actions of the state for purposes of a parent's § 1983 claim alleging a violation of the "right to parent". *Id.* The non-profit organization for which the counselor worked provided social welfare services to teenagers with a history of violence or abuse. *Id.* at *4. The counselor had informed the state's child protective services agency that the parent had hit and choked her daughter. *Id.* After numerous prosecutorial proceedings, the child protective services agency dropped the charges. *Id.* Applying all three of the tests acknowledged by the Sixth Circuit, the district court concluded that there was no "state action" on the part of the counselor such that a § 1983 claim could proceed. *Id.* at *5, citing *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001); *Chapman v. Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003).

Applying the public function test, the district court ruled that providing social welfare services to minors was not a "traditionally exclusive governmental function". *Id.* at *5. Further, the district court noted that there was no evidence in the record that the organization serviced only clients by court order or that it served a function reserved exclusively to the state, such as holding an election or exercising eminent domain. *Id.* Under the "state compulsion" test, the district court noted that the plaintiff had alleged that the organization and the counselor met the requirements of this test because they were directed to provide a specific program and report the child's progress to the court. The district court noted that the

"state compulsion test" required that the state "exercise such coercive power or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Id.*, citing *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 565 (6th Cir. 2007). The district court concluded that the activity complained of did not meet the "state compulsion" test because there was no evidence that the state exercised "coercive power" over the conduct of the organization or the counselor. *Id.* The dispositive factor, according to the district court, was that there was no evidence that the state "monitored or controlled *the conduct*" of the counselor or the organization in a way that could be deemed to have been the action of the state. *Id.* (emphasis added). Finally, the district court concluded that the "nexus" test had not been met

Similar results have been reached in other circuits. *Martinez v. County of Kern*, 2007 WL 1079937, *5-6 (E.D. Cal. 2007) (holding that *placement* recommendations of minor children that had been removed from their original homes was not "state action" as the recommendations and actions of the private organizations were distinguished from *actual removal from custody*, which was a prerogative exclusively within the auspices of the state); *Mabe v. San Bernardino County Dept. of Social Services*, 237 F.3d 1101, 1109, n. 3 (9th Cir. 2001) (foster parents not state actors); *Rayburn ex. rel. Rayburn v. Hogue*, 241 F.3d 1341, 1348 (11th Cir. 2001) (same); *Robert S. v. Stetson School, Inc.*, 256 F.3d 159, 168, n. 9 (3rd Cir.

2001) (legal custodian not state actor); *Malachowski v. City of Keene*, 787 F.2d 704, 710-11 (1st Cir. 1986), cert. denied, 107 S. Ct. 107 (1986) (a private, non-profit organization that made available foster care for state agencies and provided recommendations to the juvenile courts with respect to child placement was not a state actor because decisions regarding disposition and recommendations regarding placement were not exclusive prerogatives of the state).

Remarkably, in each of the cases cited in which "state action" was *not* found, the private, non-profit organizations were engaged in exceedingly greater involvement and conduct than the Care House Respondents in the instant case. As noted by the district court, the only involvement that the Care House Respondents had in this matter was to conduct the interview of Petitioner's minor daughter, which was being observed, without her knowledge, by a law enforcement official, a crisis counselor, Care House's coordinator, and an assistant prosecutor. RE #52, p. 5; RE #37, The Care House Respondents' Brief in Support of Summary Judgment, Exhibit 2, Care House Records, p. 4. The Care House Respondents played no role in the investigation, recommendations and decisions which were made by law enforcement officials and prosecutors to actually prosecute Petitioner. RE #37, The Care House Respondents' Brief in Support of Summary Judgment, Exhibit 3, Amy Allen's Affidavit. The record demonstrates that the Care House Respondents conducted an interview, the objective results of which were available for review

and decision by law enforcement and prosecutors. These actions on the part of the Care House Respondents are even more removed from those in the cited cases finding no state action where a private, non-profit organization actually plays a proactive role in recommending and deciding placement options for minor children. *Reguli*, *supra* at *4-6; *Martinez*, *supra* at *5-6; *Malachowski*, *supra* at 710-11.

It should be noted that the district court concluded that, even assuming that the Care House Respondents could be deemed state actors, Petitioner's § 1983 claim failed as a matter of law because he failed to produce any evidence that the actions and/or conduct of these defendants was the proximate cause of any alleged injury. The district court correctly cited the prevailing case law in the Sixth Circuit which holds that preliminary factual and investigative steps that lead to prosecution and conviction or other orders from a court are only remote causes of the event forming the basis of the § 1983 claim. *Sutkiewicz v. Carlson*, 850 F.Supp. 579, 588-89 (E.D. Mich. 1994), rev'd on other grounds by *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352 (6th Cir. 1997).

II. Collateral Estoppel Bars Petitioner's Claims Against The Care House Respondents

Assuming arguendo that the Care House Respondents were state actors and that a § 1983 claim could be brought against them, the district court correctly concluded that Petitioner was collaterally

estopped from asserting such claims against them. As the district court noted, the only actions in which the Care House Respondents engaged were (1) interviewing Elizabeth, (2) informing the Troy Police that a previous abuse claim file involving Petitioner and his children had been closed as unsubstantiated, and (3) Amy Allen's testimony as a witness for Petitioner at the preliminary hearing to determine probable cause. At that preliminary examination, which is an adversary proceeding under Michigan law, *People v. Johnson*, 154 N.W.2d 671 (1967), Petitioner contested the issue of probable cause. He was represented by counsel, who cross-examined witnesses produced by the prosecution. At the conclusion of the preliminary examination, the state trial court concluded that there was probable cause. RE #37, The Care House Respondents' Motion and Brief in Support of Summary Disposition, Exhibit 6, Circuit Court Transcript, pp. 137-39. Under these circumstances, since Petitioner had a "full and fair opportunity" to litigate the issue of probable cause at the prior state court proceeding *and* because the only acts engaged in by the Care House Respondents was the provision of objective information arising out of the results of a previous investigation and the interview of Petitioner's daughter, Petitioner is collaterally estopped from proceeding with his § 1983 against these defendants. *Coogan v. City of Wixom*, 820 F.2d 170, 175 (6th Cir. 1987) (holding that plaintiff in a § 1983 lawsuit was collaterally estopped from litigating the issue of

probable cause since it was fully explored at a preliminary examination and he was bound over for trial).

As the district court correctly noted, where questions arise as to the integrity of the allegations and evidence provided against the individual claiming a subsequent violation or deprivation of rights under § 1983, a claim may be stated, although ultimately not proved. However, where, as here, the Care House Respondents were "not influenced, directed or controlled by any of the individuals who observed the interview", RE #37, The Care House Respondents' Motion for Summary Judgment Exhibit 3, p. 3, ¶ 7; were not "involved in the investigation which took place after the interview," *id.* ¶ 12; "did not participate in the decision making process engaged in by the Oakland County Prosecutor's office with respect to filing and/or pursuing criminal charges against Mr. Petitioner," *id.*, ¶ 13; and "did not encourage or participate in the investigation by the Troy Police nor in the investigation, actions and decisions made by the Oakland County Prosecutor," *id.*, p. 5, ¶ 16, a § 1983 claim would not lie. *Skousen v. Brighton High School*, 305 F3d 520, 529 (6th Cir. 2002) (holding that where there was no evidence that police officers made or were even involved in a decision to prosecute a claim under § 1983 for malicious prosecution could not survive). In the instant case, the involvement of the Care House Respondents is even further removed from the ultimate injury complained of by Petitioner. The Care House Respondents engaged in acts which revealed certain objective facts, which

law enforcement officials then referred to the county prosecutor, who then brought charges against Petitioner before a trial court judge who found sufficient probable cause existed after conducting a preliminary examination at which Petitioner was represented by counsel who cross-examined the prosecution's witnesses and presented witnesses on behalf of Petitioner. Certainly if a police officer's minimal involvement in law enforcement absent any showing of malicious intent or false testimony cannot provide the basis for a § 1983 claim where subsequent events reveal the existence, at least, of probable cause, the Care House Respondents are even more insulated and removed from the chain of causation and proximate cause necessary to support a § 1983 claim. *Sutkiewicz*, *supra* at 588 (proximate (legal) cause is an essential element of a § 1983 claim). As the Care House Respondents initially argued that collateral estoppel barred Petitioner's § 1983 against them, and as demonstrated by the foregoing analysis, Petitioner has failed to rebut the evidence in the record that these defendants were in no way involved in recommending, deciding, or directing the course of the investigation against Petitioner, he is barred from proceeding against them under § 1983. *Skousen*, *supra*.

CONCLUSION

The district court correctly entered summary judgment in favor of the Care House Respondents where there was no evidence that could ever be presented to demonstrate that they were state actors. The district court also correctly ruled that if the Care House Respondents were state actors, their actions and conduct could not have been the proximate (legal) cause of the injuries complained of. Moreover, even if the Care House Respondents are state actors, countervailing circumstances exist to protect this entity while it goes about performing its primary function to protect minor children from abuse and neglect. Alternatively, the doctrine of collateral estoppel bars Petitioner's claim.

For the foregoing reasons, Petitioner's request for review of the Circuit Court's opinion should be denied.

Respectfully submitted,

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